The South African Law of Persons

Fifth Edition

Jacqueline Heaton

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THE SOUTH AFRICAN LAW OF PERSONS

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© 2017

First Edition 1999, Reprinted 2000, 2001, 2002, 2003
Second Edition 2003, Reprinted 2004, 2005, 2007
Third Edition 2008, Reprinted 2011
Fourth Edition 2012, Reprinted 2016, 2017

ISBN 978 0 409 12899 4

E-book ISBN 978 0 409 12900 7

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Editor: Lisa Sandford
Technical Editor: Liz Bisschoff

Printed by *paarlmedia*, a division of Novus Holdings
16674599

PREFACE

I wish to thank the team at LexisNexis and, in particular, Corné Human, Mandy Jonck, Lisa Sandford and Liz Bisschoff for the quality of their input, and their co-operation, efficiency and friendliness. Lisa Sandford deserves special thanks for preparing the Table of Cases, Table of Statutes and the Index.

This work reflects the law as at 31 July 2017. Decisions up to the July 2017 law reports were considered for inclusion in the book.

JACQUELINE HEATON
Pretoria

October 2017

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1

INTRODUCTION

1.1 Definition of the law of persons

Loosely defined, the law of persons is that part of private law which determines which beings are legal subjects, when legal personality begins and ends, what legal status involves, and what effect various factors (such as being born of unmarried parents, minority, and mental incapacity) have on a person's legal status.

Before the law of persons is discussed in detail a few basic legal concepts should be explained.

1.2 Law and rights

The law can be viewed from different angles. On the one hand it is a system of norms of conduct or rules posited by competent bodies to regulate relations between members of the community in a peaceful and just manner. In this sense we are concerned with the law in the objective sense[1] (*objektiewe reg*). Examples of such norms of law are that one should fulfil one's contracts, that one person should not cause damage to another, that one should have a driver's licence if one drives a motor vehicle on a public road, and so forth.

Viewing the law from another angle, it is not norms of conduct or rules that are at issue, but rather a network of legal relationships amongst legal subjects. Here we are concerned with rights, or law in the subjective sense[2] (*subjektiewe regte*). For example, if a person owns a motor vehicle, he or she has a right to that motor vehicle, which all other legal subjects must respect, and if a person concludes a contract with somebody else, that person has a right to fulfilment of the contractual obligations, which the other party to the contract must meet.

Thus rights concern a dual relationship:

(1) The legal relationship between the bearer of the right and other legal subjects. This is the subject-subject relationship. The content of this relationship is a right and a corresponding obligation – the bearer of the right is entitled to the right as against other legal subjects, who are obliged to respect it. After all, it makes little sense to speak of a right if it does not operate against other legal subjects.

(2) The legal relationship between the bearer of the right and the object of the right. This is the subject-object relationship. One can speak of a right only if the right relates to an object. For example, one has a right to one's motor vehicle (which operates against all other legal subjects). It would be meaningless to have a right against others if that right did not pertain to some object or another.[3]

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1 See further Hosten, Edwards, Bosman and Church ch 1; Van Apeldoorn 36 *et seq*, 128; Van der Vyver and Joubert 31 *et seq*; Van Zyl and Van der Vyver 412 *et seq*.

2 Van der Vyver and Joubert 1 *et seq*; Van Zyl and Van der Vyver 355 *et seq*; Joubert 1958 *THRHR* 12 *et seq*, 98 *et seq*.

3 See further Joubert 1958 *THRHR* 12 *et seq*, 98 *et seq*.

The connection between law and right is that the norms of the law determine how far the powers of the bearer of a right extend; in other words, the law determines the content and limit of every right. The owner of a motor vehicle may, *inter alia*, drive the vehicle, but may not do so in a way that causes harm to another. An owner of land may build on it, lease or mortgage it, and so forth but may not dig a trench on the boundary to cause the neighbour's land to cave in.

1.3 Legal subject and legal object

Legal norms make a basic distinction between legal subjects (for example, human beings) on the one hand and legal objects (for example, animals, furniture, motor vehicles, immovable property and other things) on the other hand.[4] The term "legal subject" (*regsubjek*) means any entity that can have rights, duties and capacities. A legal subject therefore is any entity which the law recognises as such and to which the law attributes the capacity to have rights, duties and capacities.[5] In other words, the law confers legal personality upon the entity.[6] An entity upon which legal personality is conferred is called a legal subject (or legal person). The ability to have rights, duties and capacities is called legal capacity.[7]

A legal subject controls and deals with legal objects and in so doing acquires rights, duties and capacities against other legal subjects and in relation to legal objects. The term "legal object" (*regsobjek*) denotes any object which has economic value[8] and upon which the law has not conferred the capacity to have rights, duties and capacities and which can therefore not participate in legal and commercial traffic. A legal object therefore is anything in respect of which a legal subject can have rights, duties and capacities but which cannot in itself have rights, duties and capacities.

There are four – or possibly five, or perhaps even six – categories of legal objects, namely corporeal things, performances, personality property, and intellectual property.[9] Personal intellectual objects and trade secrets, respectively, possibly constitute the fifth[10] and sixth categories.[11] Each category confers a different type of right (*subjektiewe reg*) on the legal subject.

1.3.1 Corporeal things

In principle, corporeal things are separate, tangible items which are susceptible to human control and which are of value to people. The right to a thing is a real right. For example, the right of ownership one has in respect of one's motor vehicle or house is a real right.

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4 See e.g. Van Zyl and Van der Vyver 371 *et seq.*

5 See e.g. Hahlo and Kahn *South Africa* 345.

6 In this book, the term "legal subject", instead of "juristic person", is used to denote any entity to which the law grants the capacity to have rights, duties and capacities. The reason for this is that the term "juristic person" has a specific technical meaning in law. It denotes a specific kind of legal subject, i.e. any entity apart from a human being or natural person, to which the law grants legal personality, e.g. a company, university or the state. Below in this chapter the juristic person in the narrow sense is again referred to.

7 Van Zyl and Van der Vyver 374 *et seq*; Robinson 1992 *THRHR* 337. On legal capacity, see further ch 3 below.

8 Economic value does not merely refer to monetary market value. Anything that is scarce and useful, even if it is only for a specific person or within a specific circle (e.g. a person's good name or a family portrait), has economic value in this sense and can therefore be a legal object.

9 See e.g. Van der Merwe 141 *et seq*; Van Zyl and Van der Vyver 407.

10 This category was identified by Neethling: see e.g. Neethling, Potgieter and Visser *Personality* 17–20; Neethling and Le Roux 1987 *Industrial Law Journal* 719; Neethling 1987 *THRHR* 316, 1990 *THRHR* 101; see also Van der Vyver in Strauss (ed.) *Huldigingsbundel vir WA Joubert* 232–233; Reinecke 1988 *De Jure* 235. Personal intellectual objects have some of the characteristics or elements of personality property and intellectual property. Earning capacity and credit-worthiness are cited as examples of objects falling within this category. But see Van der Merwe and Olivier 186–187 fn 28 who reject this category.

11 Knobel 2001 *THRHR* 572 suggests that trade secrets should be recognised as an independent right; see also Van Heerden and Neethling 224.

1.3.2 Performance

Performance is a human act by which something is done or not done. The right to performance is a personal right (*persoonlike reg*), or a claim (*vorderingsreg*). For example, if A and B agree that A will sell his motor vehicle to B for R100 000, B has a personal right to performance by A (or it can be said that B has a claim against A), that is, that A must deliver the motor vehicle to B. Similarly, A has a personal right to performance by B, that is, that B must pay him R100 000.

1.3.3 Personality property

Personality property relates to aspects of a person's personality. The right to personality property is a personality right. A person's rights to his or her good name (that is, his or her reputation), honour, personal identity and physical integrity are examples of personality rights.

1.3.4 Intellectual property

Intellectual property refers to the incorporeal objects which come into existence through a person's intellectual activity but exist independently of that person, for example, copyright, trademarks, designs, and patents. Thus, for example, once a piece of music has been composed or a book has been published, it is protected by copyright, and once an invention has been patented, it is protected by patent law. In all these cases the object of the right is the product of the human intellect but it exists independently of the person whose intellect was used to create the product.

1.4 Different kinds of legal subjects

As was pointed out above, legal personality is bestowed only on legal subjects. South African law recognises two categories of legal subjects: natural persons and juristic or artificial persons.

1.4.1 The natural person

In South African law, all human beings are recognised as legal subjects regardless of, for example, their age, or intellectual or physical ability. Therefore every human being can have rights, duties and capacities although the content of these rights, duties and capacities may vary depending on factors such as the person's mental capacity and age.[12] To distinguish them from other legal subjects, humans are known as natural persons.

In the past, some humans were not recognised as legal subjects. For example, slaves at the Cape were legal objects until slavery was abolished in 1834.[13] In Roman and Roman-Dutch law, children who were born severely malformed – the so-called *monstra* – were not regarded as legal subjects either. They could be killed after permission had been granted by a magistrate.[14] This rule does not apply in South African law.[15]

1.4.2 The juristic (or artificial) person

The human being or natural person is not the only legal subject recognised by South African law. The demands of the legal order necessitate that legal personality also be bestowed on certain associations of natural persons. Apart from the individual human beings who make up such an association, each one of whom is of course a legal subject, a new legal

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12 On the content of a person's rights, duties and capacities, see ch 3 below.

13 Cory vol III 42 *et seq.*

14 See in general Twelve Tables 4 No 1; *D* 1.5.14; *C* 6.29.3; Grotius 1.3.5; Voet 1.6.13; Van der Keessel *Praelectiones* 1.3.5; see also Leyser 9.597.7; Matthaeus *De Criminibus* 48.5.1.6; Van der Linden 2.5.2.

15 See *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 865 where it was stated that "the birth of a *monstrum* in the Roman sense is a physical impossibility".

subject comes into being, namely the association itself. Such an association to which legal personality is granted is called a juristic person or an artificial person.[16]

The juristic person, as a legal subject, enjoys a legal existence independent from that of its members or the natural persons who created it. Naturally the juristic person must always act through its functionaries. For example, in the case of a company the directors or officers act on behalf of the juristic person (namely, the company). However, when the functionaries act on behalf of the juristic person, it is the juristic person that acquires rights, duties and capacities and not the functionaries themselves in their personal capacities. For example, through its functionaries a company can bind itself by contract, be the owner, lessor or lessee of things, commit and be held liable for certain delicts and even certain crimes, sue its debtors, be sued by its creditors, and so forth.

Our law recognises the following entities as juristic persons:

(1) Associations incorporated in terms of general enabling legislation, such as companies,[17] banks,[18] mutual banks,[19] and co-operatives.[20]

(2) Associations especially created and recognised as juristic persons in separate legislation, for example, universities, semi-state organisations (that is, organisations that are partly owned by the state) and public corporations such as the SABC.

(3) Associations which comply with the common-law requirements for the recognition of legal personality of a juristic person.[21] At common-law, such juristic persons are known as *universitates*. A *universitas* must meet the following requirements to be recognised as a juristic person:
   (a) The association must have a continuous existence irrespective of the fact that its members may vary.
   (b) It must have rights, duties and capacities or be able to have rights, duties and capacities in its own right, (that is, distinct from the rights, duties and capacities of the individual members in their personal capacities). The fact that the association regards itself as a juristic person with rights, duties and capacities is important but not decisive.
   (c) Its object must not be the acquisition of gain.

Measured against these three requirements the courts have held that *inter alia* the following associations have legal personality – a church,[22] a political party,[23] and a trade union.[24]

A trust is not a juristic person.[25] Nor is a partnership a juristic person. Thus, for example, the individual partners are responsible for partnership debts out of their private funds.[26]

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16 See e.g. Van Zyl and Van der Vyver 388 *et seq.*
17 In terms of the Companies Act 71 of 2008.
18 In terms of the Banks Act 94 of 1990.
19 In terms of the Mutual Banks Act 124 of 1993.
20 In terms of the Co-operatives Act 14 of 2005.
21 On the common-law juristic person, see Pienaar *passim*; *Wille's Principles* 396–397.
22 *Louvis v Diconomos* 1917 TPD 465; *De Vos v Die Ringskommissie van die NGK* 1952 (2) SA 83 (O); *Malebjoe v Bantu Methodist Church of South Africa* 1957 (4) SA 465 (W).
23 *Wilken v Brebner* 1935 AD 175.
24 *Amalgamated Engineering Union v Minister of Labour* 1965 (4) SA 94 (W).
25 See e.g. *Commissioner for Inland Revenue v Friedman* 1993 (1) SA 353 (A); *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA); *Lupacchini v Minister of Safety and Security* [2011] 1 All SA 138 (SCA). Certain Acts do, however, confer legal personality on trusts for specific purposes, such as taxation: Income Tax Act 58 of 1962 s 1.
26 The law does, however, recognise some exceptions to the rule that a partnership is not a separate legal entity. E.g., Rule 14(2) of the Uniform Rules of Court allows a partnership to sue and be sued in its own name.

1.5 Law of persons, the Constitution, and transformative constitutionalism

The Constitution of the Republic of South Africa, 1996 is the supreme law of the country.[27] All law and public power derive their force from the Constitution,[28] and any law or conduct which is inconsistent with the Constitution is invalid.[29] "[A]ny law" refers to any legal rule deriving from the common law, customary law, or statute. Unconstitutional law does not automatically cease to exist – it applies until it is repealed by Parliament or declared unconstitutional by a court.[30]

The Bill of Rights[31] and the constitutional values set out in section 1 of the Constitution (particularly human dignity, the achievement of equality, and the advancement of human rights and freedoms)[32] are the key provisions in testing law and conduct for constitutionality. These provisions have been the foundation of statutory and judicial development of several aspects of the law of persons, including the extensive revision of the legal position of unmarried fathers by the Children's Act 38 of 2005;[33] the extension of the duty of support to the paternal grandparents of a child born of unmarried parents by *Petersen v Maintenance Officer*;[34] the enactment of the provisions of the Children's Act which supplement the rights that the Constitution confers on every child;[35] the protection afforded in *Malcolm v Premier, Western Cape Government NO*[36] to minors whose claims would have prescribed as a result of the lowering of the age of majority; and the protection and special rights afforded to mentally ill persons by the Mental Health Care Act 17 of 2002.[37] So far, failed constitutional challenges of aspects of the law of persons have included *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus Curiae*)*,[38] where the provisions of the Choice on Termination of Pregnancy Act 92 of 1996 which allow a minor independently to consent to the termination of her pregnancy were unsuccessfully

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27 Constitution s 2.

28 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC), 2000 (2) SA 674 (CC); *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) BCLR 156 (CC), 2002 (2) SA 715 (CC); *Van der Walt v Metcash Trading Ltd* 2002 (5) BCLR 454 (CC), 2002 (4) SA 317 (CC); *Alexkor Ltd v The Richtersveld Community* 2003 (12) BCLR 1301 (CC), 2004 (5) SA 460 (CC); *S v Basson* 2004 (6) BCLR 620 (CC), 2005 (1) SA 171 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC), 2004 (4) SA 490 (CC); *Mankayi v Anglogold Ashanti Ltd* 2011 (5) BCLR 453 (CC), 2011 (3) SA 237 (CC); *Mansingh v General Council of the Bar* 2014 (1) BCLR 85 (CC), 2014 (2) SA 26 (CC).

29 Constitution s 2.

30 All courts do not have the same jurisdiction to declare a law or conduct unconstitutional. The Constitutional Court is the only court which has jurisdiction in all constitutional matters: s 167(3)(*b*) of the Constitution. The Supreme Court of Appeal only has jurisdiction in respect of appeals and issues connected with appeals relating to constitutional matters decided by the High Court: s 168(3)(*b*). The High Court may decide any constitutional matter except one that the Constitutional Court has agreed to hear directly or a matter that the legislature has assigned to another court that has a status similar to the High Court: s 169(1). However, if it (or the Supreme Court of Appeal) declares an Act or a provision of an Act invalid, the order has no force unless it is confirmed by the Constitutional Court: s 167(5). The lower courts (magistrates' courts) may decide any constitutional matter except one relating to the constitutionality of any legislation or any conduct of the President: s 170.

31 The Bill of Rights is contained in ch 2 of the Constitution.

32 S 1(*a*).

33 See further ch 5 below.

34 [2004] 1 All SA 117 (C), 2004 (2) BCLR 205 (C) (also reported as *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C)), Heaton *Casebook on the Law of Persons* case **[23]**. See further ch 5 below.

35 See further ch 6 below.

36 [2014] 2 All SA 251 (SCA), 2014 (3) SA 177 (SCA), Heaton *Casebook on the Law of Persons* case **[37]**.

37 See further ch 7 below.

38 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)), Heaton *Casebook on the Law of Persons* case **[4]**.

challenged;[39] and *Christian League of Southern Africa v Rall*,[40] where an application for the appointment of a *curator ad litem* to represent the interests of an unborn child in all matters concerning a proposed termination of pregnancy was dismissed.[41]

Further developments based on the Constitution are sure to follow. For example, authors and the courts are of the view that the rule that a husband's *lex domicilii* at the time of his marriage dictates the spouses' matrimonial property system should be declared unconstitutional;[42] and it seems unlikely that the infringement of a prodigal's constitutional rights by the court order interdicting him or her from administering his or estate will withstand constitutional scrutiny.[43]

It must moreover be borne in mind that the relevance of the Constitution and the scope of its influence are far-reaching. The Constitution is not to be used only in a formalistic manner, to effect changes to the law solely by way of a technical and literal reading of the law.[44] The Constitution has a much broader role: it is a powerful instrument to facilitate and achieve transformation in society. Therefore, the approach that should be adopted to the role of the Constitution is called "transformative constitutionalism".[45] The objective of transformative constitutionalism is to use the Constitution to move South Africa "from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance"; that is, the goal is "a society based on democratic values, social justice and fundamental human rights".[46] Transformation of the legal system and legal culture is crucial in this endeavour. As the Constitutional Court stated in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*:[47]

> Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system.

Therefore, we must engage in a substantive, value-based analysis and evaluation of all aspects of the law in order to establish whether the legal outcomes are justified in terms of the norm of transformative constitutionalism.[48] The Constitution and its transformative goals are the prism through which all aspects of the law must be viewed. Every aspect of each field of law, including the law of persons, must be studied and evaluated in order to determine whether a better legal outcome can be achieved by using the transformative potential offered by the Constitution.[49]

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39 See further chs 2 and 6 below.

40 1981 (2) SA 821 (O).

41 See further ch 2 below.

42 See further ch 4 below.

43 See further ch 10 below.

44 See e.g. Cockrell 1996 *SAJHR* 1–10; Langa 2006 *Stell LR* 351–353; Davis and Klare 2010 *SAJHR* 407–408.

45 The term "transformative constitutionalism" was coined by Klare 1998 *SAJHR* 146.

46 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) par [21]; see also *Daniels v Campbell NO* 2004 (7) BCLR 735 (CC), 2004 (5) SA 331 (CC); *Botha v Rich NO* 2014 (7) BCLR 741 (CC), 2014 (4) SA 124 (CC).

47 2009 (7) BCLR 637 (CC), 2009 (4) SA 222 (CC) par [2].

48 See e.g. Klare 1998 *SAJHR* 156; Langa 2006 *Stell LR* 354; Quinot 2012 *SALJ* 413–414.

49 On transformative constitutionalism, see further Humby, Kotzé and Du Plessis (eds) *Introduction to Law* 38–43; Moseneke 2002 *SAJHR* 309; Pieterse 2005 *SAPL* 155; Van der Walt 2005 *TSAR* 655; Van der Walt 2006 *TSAR* 1; Moseneke 2009 *Stell LR* 3; Roux 2009 *Stell LR* 258; Van Marle 2009 *Stell LR* 286; Davis and Klare 2010 *SAJHR* 403; Sibanda 2011 *Stell LR* 482; Rosa 2011 *Stell LR* 542; Quinot 2012 *SALJ* 411; Sibanda 2013 *Stell LR* 329; Brickhill and Van Leeve 2015 *Acta Juridica* 141; Fish 2015 *Acta Juridica* 189; Liebenberg 2015 *SAJHR* 446; Madlingozi 2017 *Stell LR* 123.

2

THE BEGINNING AND END OF LEGAL PERSONALITY

2.1 The beginning of legal personality

A natural person's legal personality begins at birth, provided that the following requirements are met:

(1) The birth must be fully completed, that is, the body of the mother and the body of the child must be completely separated.[1] For birth to be completed it is not required that the umbilical cord be severed.

(2) The child must live after the separation even if only for a short period.[2] A stillborn child or a child who dies during birth therefore does not acquire legal personality. In our law it has not yet authoritatively been decided how life after birth must be proved. Normally, evidence that the child breathed is accepted. However, any medical evidence by which life may be proved should be admissible when the issue of whether a child was born alive is to be decided for purposes of determining whether the child obtained legal personality.[3]

Some authors maintain that the child must also be viable before legal personality is conferred upon him or her.[4] This means that the child must have reached such a stage of development that he or she can exist independently of his or her mother's body. Thus if a child is born but, in light of human experience, has no chance of remaining alive (for example, because he or she is born so prematurely, deformed or ill that his or her early death is inevitable right from the start) the child is not recognised as a legal subject even if he or she is completely separated from his or her mother's body and even if he or she actually lives for a while. It is doubtful whether viability ever was a requirement in Roman or Roman-Dutch law[5] and it is suggested that it is not a requirement for the commencement of legal personality in South African law either.[6] The problem with requiring that the child must be viable is that viability is a vague concept that gives rise to all sorts of questions. For example, how short must a child's life have been for his or her early death to have been considered inevitable right from the start? And what is the position of a child who stays alive notwithstanding the fact that he or she was regarded as not being viable? When does such a child become a legal subject?

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1 *D* 25.4.1.1, 35.2.9.1; *C* 6.29.3; Voet 1.5.5.

2 *D* 50.16.129; *C* 6.29.3.

3 See also Boezaart *Persons* 13; Kruger and Skelton (eds) *Persons* 22; Mahler-Coetzee in Barratt (ed.) *Persons and the Family* 31; Van der Vyver and Joubert 59.

4 Boberg 8; Van Zyl and Van der Vyver 385.

5 Asser *Het Nederlandsch Burgerlijk Wetboek* 16; Fockema Andreae *Oud-Nederlandsch Burgerlijk Recht* vol I 128; Lee *Commentary on De Groot* 6; Von Savigny *System* vol II 10–11 *Beylage* 3, 385 *et seq.* But see Dernburg 110–111; Windscheid 233.

6 See also Boezaart *Persons* 13; Cronjé *LAWSA* vol 20 part 1 *Persons* par 440; Kruger and Skelton (eds) *Persons* 23; Van der Vyver and Joubert 61.

2.2 Registration of births

In terms of the Births and Deaths Registration Act 51 of 1992, the Director-General of Home Affairs (or any person to whom the Director-General has delegated his or her powers and duties) must be notified of the birth of every child who was born alive.[7]

As a rule, the notice must be given by the child's parents within 30 days of the child's birth.[8] Where possible, both parents must give notice.[9] If both parents are deceased, notice must be given by the child's next-of-kin or legal guardian.[10] If the child has already reached the age of 18 years, he or she may personally give notice.[11]

The notice of birth must be accompanied by the documents prescribed in the regulations made under the Act. These documents include a proof of birth form attested to by a medical practitioner who attended to the child's birth or examined the child or his or her mother after the birth; an affidavit by a South African citizen who witnessed the birth if the birth did not take place at a health institution; a palm, foot or fingerprint of the child; fingerprints of the parent(s); and certified copies of the identity document, passport, visa, or permit of the parent(s), next-of-kin or legal guardian.[12] If the notice is given after 30 days from the date of birth but before the child is older than a year, the notice must in addition be accompanied by a form setting out the reasons why notice is being given late.[13] If the child is older than one year when notice is given, the notice must be accompanied *inter alia* by a proof of birth form attested to by a medical practitioner who attended to the child's birth or examined the child or his or her mother after the child's birth; an affidavit by a South African citizen who witnessed the birth if the birth did not occur at a health institution; a palm, foot or fingerprint of the child if the child is younger than seven years of age; fingerprints of the parents and of the child if the child is seven years or older; photographs of the child if the child is seven years or older; certified copies of the identity document, passport, visa or permit of the child's parent(s), next-of-kin or legal guardian and of the child if he or she is seeking to register his or her own birth; and a form providing details of the child's life events, including his or her place of birth, religious ceremonies performed in respect of the child, pre-school institutions or crèches the child attended; schools and tertiary institutions the child attended, and the child's employment record.[14]

In the case of an abandoned child, notice is given, after an enquiry has been undertaken in terms of the Children's Act 38 of 2005, by the social worker involved in the enquiry.[15] The same applies in respect of notice of the birth of an orphan whose birth has not already been registered.[16]

No birth may be registered unless a forename (that is, a first name or individual name) and a surname (or family name) have been assigned to the child.[17]

Notice of the birth of a child who was born of parents who were married to each other at the time of his or her conception or birth or at any intervening time is given under the

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7 S 4. Although only the birth of a live child qualifies as a "birth" in terms of the Act, notice must also be given of a stillbirth. S 18 of the Births and Deaths Registration Act governs notices of stillbirth. S 18 is discussed in more detail below in this chapter.

8 S 9(1); regs 3(1) and 8(1).

9 Regs 3(3) and 4(3). S 9(3A) read with regs 4(1), 4(2), 5(1) and 5(2) regulate the position if notice is given after the 30-day period has expired.

10 S 9(1) read with regs 3(2) and 8(2).

11 S 9(3A) read with reg 5(2).

12 Regs 3(3) and 8(3).

13 S 9(3A), reg 4 read with Annexure 2A.

14 Reg 5(3) read with Annexure 2B.

15 S 12(1).

16 S 12(2).

17 S 9(6). In terms of s 28(1)(*a*) of the Constitution of the Republic of South Africa, 1996 every child has the right to a name. On a child's constitutional rights, see ch 6 below and Heaton and Kruger *Family Law* ch 22.

surname of either parent or both parents' surnames joined together as a double-barrel surname.[18] This applies regardless of whether the parents entered into a civil union or a civil or customary marriage.[19] However, it does not apply if the parents entered into a religious marriage.[20] The exclusion of religious marriages has the illogical consequence that a child born of the parties to a religious marriage is not registered as having been born of married parents even though the child's parents have joint parental responsibilities and rights in terms of the Children's Act on the basis that the child has been born of married parents.[21]

Prior to the coming into operation of section 40 of the Children's Act 38 of 2005, notice of the birth of a child who was born as a result of the artificial fertilisation of a lesbian partner in a same-sex life partnership was given under the surname of the birth mother, her same-sex life partner, or both life partners' surnames joined together as a double-barrel surname. This was the position because of the decision in *J v Director General, Department of Home Affairs*[22] where the Constitutional Court placed a child born as a result of the artificial fertilisation of a lesbian life partner on the same footing as a child born as a result of the artificial fertilisation of a married woman. The Constitutional Court, *inter alia,* declared section 5 of the Children's Status Act 82 of 1987 unconstitutional. Section 5 treated a child born as a result of the artificial fertilisation of a married birth mother differently from a child born as a result of the artificial fertilisation of a birth mother who was a partner in a same-sex life partnership. The section afforded the child the status of a "legitimate" child (that is, a child born of married parents) if his or her birth mother was married, but not if his or her birth mother was a party to a same-sex life partnership.[23] The Constitutional Court held that this differentiation unjustifiably discriminated unfairly against same-sex life partners on the ground of their sexual orientation.[24] The court amended section 5 by making a striking-out and reading-in order which had the effect of applying the section to a child who was born as a result of the artificial fertilisation of a same-sex life partner.[25] Subsequently, the Children's Act repealed the whole of the Children's Status Act.[26] However, section 40 of the Children's Act re-enacted the unamended content of section 5 of the Children's Status Act. In so far as same-sex couples who have entered into a civil union are concerned, this is not a problem, because section 13 of the Civil Union Act equates a civil union with a civil marriage. Thus, a child who is born as a result of the artificial fertilisation of a civil union partner qualifies as a child who is born of married parents. However, in the case of same-sex life partners who have not entered into a civil union, section 40 of the Children's Act might be challenged on grounds which are similar to those raised in *J v Director General, Department of Home Affairs.* In reply it might be argued that because same-sex life partners now have the option of entering into a civil union, they are subject to the same choice argument that held sway in respect of heterosexual life partners in *Volks v Robinson.*[27] In *Volks* the majority of the Constitutional Court held that the law may distinguish between

18 S 9(2) read with the definition of "child born out of wedlock" in s 1. On the distinction between children who are born of married parents and those who are born of unmarried parents, see ch 5 below.

19 Definition of "marriage" in s 1 of the Births and Deaths Registration Act; see also s 2(1) and (2) of the Recognition of Customary Marriages Act 120 of 1998 which affords full recognition to customary marriages, and s 13 of the Civil Union Act which confers the consequences of a civil marriage on a civil union.

20 Definition of "marriage" in s 1 of the Births and Deaths Registration Act.

21 Ss 19 and 20 read with the definition of "marriage" in s 1(1) of the Children's Act.

22 2003 (5) BCLR 463 (CC).

23 On the status of children born as a result of artificial fertilisation, see ch 5 below.

24 S 9(3) of the Constitution provides that no person may be unfairly discriminated against, *inter alia,* on the ground of his or her sexual orientation.

25 The court *inter alia* struck out the word "married" and read in the phrase "or permanent same-sex life partner" in several places in s 5.

26 Children's Act s 313 read with Schedule 4.

27 2005 (5) BCLR 446 (CC). But see Smith in Heaton (ed.) *Law of Divorce and Dissolution of Life Partnerships* 449, who submits that the choice argument should not play a role in matters dealing with children and that s 40 of the Children's Act should be broadened to encompass all permanent life partners.

married and unmarried people and accord certain benefits (in this case, the right to claim under the Maintenance of Surviving Spouses Act 27 of 1990) to married people which it denies to unmarried people, because unmarried people's choice not to marry justifies withholding those marital benefits from them. At the time when *Volks* was decided, the Civil Union Act had not yet been enacted. Now, same-sex couples can acquire the same marital benefits as heterosexual couples by entering into a civil union. For this reason, it might be argued that the law should withhold protection from same-sex life partners who fail to enter into a civil union and that section 40 of the Children's Act consequently does not violate the Constitution. Then again, it should be noted that the majority decision in *Volks* has been stridently criticised,[28] and that the Constitutional Court seems to have come to accept that the judgment should be reconsidered. In his separate concurring judgment in *Laubscher NO v Duplan*,[29] Froneman J stated that "the criticisms [of the majority judgment in *Volks*] appear to be valid" and that *Volks* reflects views which are "not inclusive enough in the present social context".[30] He concluded that "*Volks* cannot stand".[31] Mbha AJ, who delivered the judgment in *Duplan* in which all the other judges[32] fully concurred, distinguished *Volks* on several grounds and held that the principles decided in *Volks* "were not directly within the purview of the facts of" *Duplan* (which concerned intestate succession). Therefore, the court did not have to reconsider *Volks* in the *Duplan* case. Mbha AJ nevertheless stated that "[t]he reasons put forward in ... [Froneman J's judgment] as to why the judgment of *Volks* cannot stand are stimulating and persuasive ... There may be an appropriate time when this Court is called upon to revisit the principles in *Volks*".[33] Therefore, one should be hesitant to support extension of the choice argument.[34]

In the case of a child who is born of parents who are not married to each other and are also not each other's civil union partners at the time of the child's conception or birth or at any intervening time, the birth is registered under the surname of the child's mother unless the child's parents jointly request that the father's surname be used.[35] The Births and Deaths Registration Act does not make provision for the child's birth to be registered under a double-barrel surname consisting of both parents' surnames. If the child's birth is to be registered under his or her father's surname, the father must acknowledge paternity in writing in the presence of the person to whom the notice of birth is given and enter his particulars on the notice of birth.[36] A father who wants to acknowledge paternity and enter his particulars after the child's birth has been registered may do so with the consent of the child's mother.[37] If the mother withholds consent, the father may apply to the High Court for a declaratory order confirming his paternity and dispensing with the mother's consent.[38] Once the particulars of the father have been entered, they may not be changed without conclusive proof being presented that the changed details are those of the person who actually is the child's father.[39] The objective of the latter provision is mainly to restrain

28 See e.g. De Vos in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs* 131–134; Cooke 2005 *SALJ* 542 *et seq*; Lind 2005 *Acta Juridica* 108 *et seq*; Wildenboer 2005 *SAPL* 459 *et seq*; Schäfer 2006 *SALJ* 640–644; Albertyn 2007 *SAJHR* 266–268; Pieterse 2008 *SAJHR* 410–412; Kruuse 2009 *SAJHR* 384; Smith 2010 *PELJ* 238 *et seq*; Meyersfeld 2010 *CCR* 280 *et seq*; Barnard-Naudé and De Vos 2010 *SAPL* 223–224; Bonthuys 2015 *SALJ* 76–77.

29 2017 (4) BCLR 415 (CC), 2017 (2) SA 264 (CC).

30 Par [84].

31 Par [60].

32 Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J.

33 Par [54].

34 On the unconstitutionality of the differentiation between heterosexual and same-sex life partners, see Heaton and Kruger *Family Law* 267–268.

35 Births and Deaths Registration Act s 10(1).

36 S 10(1)(*b*).

37 Births and Deaths Registration Act s 11(4); see also s 26(1) of the Children's Act.

38 Births and Deaths Registration Act s 11(5).

39 S 11(4A).

parents from registering their child's birth under one father's surname and subsequently falsely changing the father's details to those of another man in order to enable the "new" father to obtain a South African immigration permit.[40]

A gamete donor and the father of a child who was conceived as a result of rape or incest may not have the child's birth registration amended to identify him as the father.[41]

If the unmarried parents of a child marry each other or enter into a civil union with each other after the child's birth has been registered, the birth registration may on application to the Director-General, be altered to reflect the child as a child born of married persons. The application may be made by either of the parents or by the child personally if he or she is already a major.[42] If the Director-General is satisfied that the applicant is competent to make the application, that the alleged parents are in fact the child's parents, and that they legally married each other, the birth will be registered as if the parents were legally married to each other or were the parties to a valid civil union at the time of the child's birth.[43]

The surname of a child who was born of parents who were married to each other or were each other's civil union partners may be changed to the surname of the child's mother if the marriage or civil union is dissolved by the death of the child's father.[44] The child's surname may also be changed to his or her mother's surname if his or her parents' marriage or civil union is dissolved by divorce and the child's mother has sole guardianship or the child's father consents to the change. The court may dispense with the father's consent.[45] If the mother enters into a new marriage or civil union, she may apply to have the child's surname changed to the surname she bears.[46] In such event, she needs the written consent of the child's father as well as the written consent of her new husband or civil union partner, unless the court dispenses with consent.[47] If the mother has sole guardianship, she does not need the father's consent, but she still needs the consent of her new husband or civil union partner, unless the court dispenses with consent.[48] A widow who enters into a new marriage or civil union may also apply to have her child's surname changed to hers.[49] In the latter event she needs the written consent of her new husband or civil union partner, unless the court dispenses with consent.[50]

If an unmarried mother marries someone other than the child's father or enters into a civil union with someone who is not the child's father, she may apply to have the child's surname changed to correspond to hers. She needs the written consent of her husband or civil union partner.[51] If the child bears his or her father's surname, the mother also needs the written consent of the child's father, unless she has sole guardianship or the court dispenses with consent.[52]

Furthermore, the surname of any person may be changed for good and sufficient reason.[53] In the case of a minor, the application for the change must be made by either of

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40 "South Africa: Govt targets fraudulent birth, deaths registrations", available at http://allafrica.com/stories/201009170892.html, accessed 4 August 2017.

41 Children's Act s 26(2).

42 Births and Deaths Registration Act s 11(1).

43 Births and Deaths Registration Act s 11(1) read with s 13(2) of the Civil Union Act; see also Children's Act s 38(1).

44 Births and Deaths Registration Act s 25(1)(*b*).

45 S 25(1)(*b*) and (1A).

46 S 25(1)(*b*).

47 S 25(1).

48 S 25(1A).

49 S 25(1)(*b*).

50 S 25(1).

51 *Ibid.*

52 S 25(1)(*c*) and (1A).

53 Ss 25(2) and 26(2). As a rule, no one may assume or pass under a surname other than that under which he or she has been included in the population register. S 26(1) of the Births and Deaths Registration Act

continued

the child's parents.[54] In the case of an adult, the person personally makes the application.[55] Any person's forename may also be changed.[56] The Act does not stipulate a ground on which the application for a change of forename must be made. In the case of a minor, the application must be made by either of the child's parents.[57] In the case of an adult, the person personally makes the application.[58]

2.3 The interests of the unborn

2.3.1 The *nasciturus* fiction

It was pointed out above that a natural person's legal personality begins at birth. Therefore, the unborn are not legal subjects and cannot have rights, duties and capacities. However, the law protects the potential interests of the unborn by employing the *nasciturus* fiction.[59] In terms of this fiction, a *nasciturus* (that is, an unborn human being) is regarded as having been born at the time of his or her conception whenever it is to his or her advantage. The full Latin adage that reflects this fiction is *nasciturus pro iam nato habetur, quotiens de commodo eius agitur* (that is, the *nasciturus* is considered to have been born when his advantage is at issue).

The fiction operates as follows: if it appears that a *nasciturus* would have had certain claims or rights had he or she already been born, the legal position is kept in abeyance until he or she is born and acquires legal personality, or until it is certain that he or she will not become a legal subject (for example, because his or her mother has miscarried or terminated the pregnancy, or because the baby was stillborn).[60] If the *nasciturus* indeed becomes a legal subject, he or she receives the rights that have been kept in abeyance for him or her.

For the *nasciturus* fiction to come into operation the following requirements must be met:

(1) The *nasciturus* must have been conceived at the time that the benefit would have accrued to him or her.[61]

(2) The *nasciturus* must subsequently be born alive.[62] If he or she is not born alive, the *nasciturus* is considered as never even having been conceived.

(read with s 13(2) of the Civil Union Act), however, exempts a woman who, on entering into a marriage or a civil union, assumes the surname of her husband or civil union partner. The exemption also applies if, after having assumed the surname of her husband or civil union partner, the woman resumes a surname she bore at any prior time, or adds the surname she acquired after entering into the marriage or civil union to any surname she bore at any prior time. It further applies to a divorced or widowed woman who resumes using a surname she bore at a previous time. On this exemption, see further Heaton and Kruger *Family Law* ch 5. How the exemption would operate in a same-sex civil union is unclear. The obvious solution is to extend the exemption to both parties to a civil union and also to extend it to both parties to a marriage, thus enabling either party to adopt the other's surname or to form a double-barrel surname. This solution would be in line with the gender equality provisions of the Constitution (e.g. s 9).

54 Births and Deaths Registration Act s 25(2).

55 S 26(2).

56 S 24(1).

57 *Ibid.*

58 S 26(2).

59 *D* 1.5.7, 1.5.26, 5.4.3, 50.16.231; Grotius 1.3.4; Voet 1.5.5, 39.5.12; Van der Keessel *Theses Selectae* 45.

60 *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O).

61 Van der Keessel *Praelectiones* 1.3.4. Lupton 1997 *TSAR* 755–756 submits that in the case of *in vitro* fertilisation only embryos that have already been implanted in a womb (be it a human or an artificial womb) should qualify for protection by means of the *nasciturus* fiction, as it would cause too much disruption if the legal position were held in abeyance until all the embryos have been implanted or donated or the suggested maximum preservation time of four years has expired.

62 *D* 5.4.3, 50.16.231; Voet 1.5.5.

It must be emphasised that application of the fiction must be to the advantage of the *nasciturus*.[63] A third person may benefit from the application of the *nasciturus* fiction if such benefit is a natural consequence of the application of the fiction in favour of the *nasciturus*, but the fiction may not be applied solely to benefit a third person.[64] Take the example of a *nasciturus* who would have received a large inheritance had he or she been born at the time of a particular person's death. If the child dies shortly after birth, the *nasciturus* fiction will not be applied, because the only persons who will benefit from the application of the fiction are the child's intestate heirs and not the child personally. The position is different if the child stays alive for a while. Because parents are responsible for their child's maintenance if their child needs maintenance and they are able to provide it, the child would have had a claim for maintenance against his or her parents were it not for the fact that he or she received the inheritance and consequently became self-supporting. The child received the inheritance because the *nasciturus* fiction was applied. In this case, applying the fiction benefits not only the child but also the child's parents because they are no longer liable for the child's maintenance.

2.3.2 The fields of application of the *nasciturus* fiction

(a) Introduction

At common law the *nasciturus* fiction was applied mainly in the field of succession.[65] In modern South African law this is still the main field in which the fiction should be applied. However, as appears from the discussion below, the fiction has been raised, and sometimes applied, in other areas of South African law, too.

(b) Succession

(i) *Intestate succession*

If a person dies without leaving a valid will, his or her estate devolves in terms of the law of intestate succession. Under the rules of intestate succession a person can only inherit if he or she is alive at the time that the estate "falls open" (that is, when *delatio* takes place). Generally, *delatio* takes place at the moment the deceased dies. It is clear that if this principle were to be strictly applied, a *nasciturus* could not qualify for an intestate inheritance. The *nasciturus* fiction is employed to protect the potential interests of such a *nasciturus*. With the aid of the fiction, distribution of the deceased estate is postponed until it is certain whether or not a live person has been born. If the child is born alive, he or she inherits as if he or she were already born at the time of the deceased's death. In the absence of live birth, the *nasciturus* does not inherit.

(ii) *Testate succession*

If a testator leaves property in a valid will, effect must be given to the provisions of the will. If the testator's intention regarding whether or not the unborn should inherit is clear, the testator's intention is simply carried out. If the testator's intention is unclear, it must be established with the aid of the rules of the law of succession.

If the testator leaves property specifically to A, B and C, while D has already been conceived at the time of the testator's death but has not yet been born, D will not inherit if he or she is subsequently born alive, even if he or she is the testator's child. Only the beneficiaries specifically mentioned in the will will inherit, as this is clearly what the testator intended.

If the testator leaves his or her property to his or her children (or grandchildren) who are "born or still to be born", any such children (or grandchildren) born after the testator's

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63 Van der Keessel *Praelectiones* 1.3.4; Grotius 1.3.4. See further *D* 1.5.7, 1.9.7.1; *Inst* 1.4 *pr*; Voet 1.5.5; Van der Keessel *Theses Selectae* 45.

64 Van der Keessel *Praelectiones* 1.3.4; Voet 1.5.5.

65 *D* 1.5.26, 5.4.3; *Inst* 3.1.8; Voet 1.5.5; Van der Keessel *Theses Selectae* 45.

death will inherit, regardless of whether or not they had been conceived at the time of the testator's death. Again the intention of the testator is clear and it is simply carried out.

If a testator does not appoint beneficiaries by name but as members of a class, a child in that class who was already conceived at the time of the testator's death but was born only after the testator's death can also inherit.[66] Thus if a testator leaves his or her estate to his or her daughter's "children" and the daughter has two children, A and B, and is expecting C at the time of the testator's death, C will share in the inheritance if C is subsequently born alive. In this regard reference should be made to *Ex parte Boedel Steenkamp*.[67] In this case, the testator left the residue of his estate to his daughter and her children "wat by datum van dood in die lewe is" (that is, who are alive at the time of my death). At the time of the testator's death, his daughter and two of her children, D and G, were alive. His daughter was, however, pregnant with P, who was later born alive. The question arose as to whether P could also share in the inheritance. Judge De Villiers said:

> Dit is gemene saak dat 'n kind *in ventre matris* vir die doeleindes van erflating vermoed word lewendig te wees mits dit later gebore word en mits dit tot die voordeel van sodanige kind is.[68] (That is, it is common cause that a child in its mother's womb is presumed to be alive for the purposes of succession, provided the child is subsequently born and that it is to the advantage of such child.)

Had the testator in this case simply left the residue of his estate to his daughter and her children, there would have been no doubt that P could also share in the inheritance, because it would clearly have been to P's benefit that he be regarded as having been born at the date of the testator's death. The question, however, was whether the words "wat by datum van dood in die lewe is" did not rebut the presumption that the testator also wished to benefit children born later. Judge De Villiers held that this was not the case and P accordingly inherited.

A testator may nominate unborn or even unconceived heirs or beneficiaries in a will or trust deed. In fact, a testator may leave property to persons who will only be born generations later. A testator may, for example, leave his farm to his son, B, subject to the proviso that the farm must devolve on B's eldest son, C, after B's death, and after C's death on his eldest son, D. Such an institution is known as a *fideicommissum*. B is known as the *fiduciarius* (or fiduciary) and C and D as the *fideicommissarii* (or fideicommissaries). In this regard the law protects the potential interests of the unborn in several ways. In the above example, fiduciary B may, in principle, not alienate or mortgage the farm without the consent of the High Court. If all the fideicommissaries are majors and give their consent to the alienation or mortgage, there will be no problem in obtaining such an order. In the case of a minor fideicommissary who has already been born alive, the High Court must give or withhold consent in its capacity as upper guardian of all minors.[69] The question of whether the High Court may also consent in the case of an unborn fideicommissary was controversial[70] until the Appellate Division (now the Supreme Court of Appeal) ruled in *Ex parte Swanepoel*[71] that the High Court cannot give such consent because it is not the upper guardian of children who do not yet exist. This decision is in line with the common law, but the legislature did not approve of its outcome and enacted section 33(1) of the General Law Amendment Act 62 of 1955. The section reads as follows:

> Whenever under a will or other instrument any unborn person will be entitled to any interest in immovable property which is subject to any restriction imposed by such will or other

66 Wills Act 7 of 1953 s 2D(1)(*c*); *Estate Lewis v Estate Jackson* (1905) 22 SC 73; *Hopkins v Estate Smith* 1920 CPD 558; *Botha v Thompson* 1936 CPD 1.

67 1962 (3) SA 954 (O), Heaton *Casebook on the Law of Persons* case [1].

68 956BC.

69 *Ex parte Odendaal* 1928 OPD 218; *Ex parte Visagie* 1940 CPD 42; *Ex parte Swanepoel* 1953 (1) SA 280 (A); *Ex parte De Winnaar* 1959 (1) SA 837 (N).

70 See e.g. *Ex parte Visagie* 1940 CPD 42; *Ex parte Strauss* 1949 (3) SA 929 (O); *Ex parte Jacobs* 1950 (1) SA 129 (T); *Ex parte De Jager* 1950 (4) SA 583 (E).

71 1953 (1) SA 280 (A).

> instrument, any provincial or local division of the Supreme Court [now the High Court] may grant its consent on behalf of any such unborn person (whether already conceived or not) to the alienation or mortgage of such property as if such unborn person were a minor *in esse* [that is, in existence].

This section expressly empowers the court to consent to the alienation or mortgage of land in which the unborn may obtain an interest, and puts conceived and unconceived beneficiaries on an equal footing in this regard.[72] The court will only give its consent if the alienation or mortgage will be to the advantage of all the beneficiaries, including those still to be born.[73] In terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965,[74] the legislature further empowered the court to remove or modify restrictions on immovable property which have been imposed by a will or another instrument if this is to the advantage of an unborn or even an unconceived beneficiary.[75] Clearly, the protection afforded by these legislative provisions is not based on the *nasciturus* fiction, as the fiction applies only to those who have already been conceived.

The Administration of Estates Act 66 of 1965 also protects the interests of the *nasciturus*. It provides that if an unborn heir will, after birth, become entitled to money or movable property which is subject to somebody else's usufructuary or fiduciary rights, that person must give security to the satisfaction of the Master of the High Court for the payment of the money or delivery of the property to the child after his or her birth. The money or property will not be paid or delivered to the person in whose favour the usufructuary or fiduciary rights operate unless such security has been given.[76] A person can only be exempted from these statutory provisions if the testator's will expressly permits this. The Act further provides that the Master of the High Court may consent to the subdivision of land on behalf of an unborn heir if this is expedient and equitable.[77]

In legal proceedings involving property in which the unborn might have an interest a *curator ad litem* looks after the unborn's interest.[78]

(c) Maintenance after birth

If a pregnant wife divorces the father of her unborn child, the court may provide for the child's maintenance in the divorce order in order to avoid the need for legal proceedings about maintenance after the child's birth.[79] The position is the same if a pregnant civil union partner divorces the unborn child's parent.[80]

In *Shields v Shields*[81] the divorcing parents of an unborn child entered into a settlement agreement which provided, *inter alia*, that the child's father would not be responsible for the child's maintenance after birth. The parents wanted this agreement incorporated into their divorce order. The court refused to do so. It held that a mother cannot waive her unborn child's right to claim maintenance, and that the agreement was *contra bonos mores* (that is, contrary to good morals, or contrary to the legal convictions of the community). A

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72 For examples of applications for the alienation or mortgaging of fideicommissary property in which unborn persons had an interest, see *Ex parte De Winnaar* 1959 (1) SA 837 (N); *Ex parte Marais* 1960 (2) SA 197 (GW). Lupton 1997 *TSAR* 757 submits that frozen embryos should be excluded from the ambit of s 33(1). His view is difficult to understand as it seems illogical not to consider a frozen embryo under legislation which expressly extends even to children that are yet to be conceived.

73 *Ex parte Visagie* 1940 CPD 42; *Ex parte De Winnaar* 1959 (1) SA 837 (N); *Ex parte Blieden* 1965 (1) SA 474 (W); *Rogers v Erasmus* 1975 (2) SA 59 (T); *Ex parte Kruger* 1976 (1) SA 609 (O).

74 S 2(1).

75 *Ex parte Barclays National Bank Ltd* 1972 (4) SA 667 (N).

76 S 44.

77 S 94.

78 See e.g. *Ex parte Louw* 1972 (1) SA 551 (O).

79 *Shields v Shields* 1946 CPD 242; *Pretorius v Pretorius* 1967 (2) PH B17 (O).

80 S 13 of the Civil Union Act equates a civil union and a civil marriage.

81 1946 CPD 242.

father would likewise not be permitted to waive his unborn child's right to claim maintenance from his or her mother after birth.

It is submitted that the regulation of maintenance for an unborn child of a divorcing couple is not a true application of the *nasciturus* fiction. It merely reflects a common-sense approach to post-divorce child maintenance that is based on expediency. If the regulation of post-divorce child maintenance were truly based on the *nasciturus* fiction, the child would have to be deemed to have been born at the time of his or her conception and would therefore be entitled to maintenance as from that date. As this would entitle the *nasciturus* to maintenance for a longer period than a child whose parents divorced each other on the day of his or her actual birth, the equality clause in the Bill of Rights[82] would be unjustifiably breached. Moreover, it would be absurd to award maintenance to a child as from the date of conception (or as from any other time before his or her actual birth).[83]

Furthermore, since the coming into operation of section 18(2)(*d*) of the Children's Act, maintenance has been statutorily included as a parental responsibility and right,[84] and no parental responsibility and right can operate before a child's *actual* birth.[85] A pregnant woman clearly cannot have parental responsibilities and rights over part of her own body. Nor can the child's father or the mother's same-sex civil union partner have parental responsibilities and rights over part of the mother's body. If the father does not have the power to stop the mother from terminating her pregnancy,[86] how could he ever have parental responsibilities and rights in respect of the *foetus*? A pregnant woman's same-sex civil union partner should also not be able to stop her from terminating her pregnancy, even if the woman's pregnancy resulted from her being implanted with the artificially fertilised ovum of her same-sex civil union partner. Thus the same argument applies to marriages and (lesbian) civil unions. Furthermore, how could parental responsibilities and rights be exercised in respect of a child who has not in actual fact been born yet?

Accepting the view that a parent cannot have parental responsibilities and rights over his or her unborn child does not affect the application of the *nasciturus* fiction in the field of succession.[87] In the case of succession the fiction is used to postpone distribution of a deceased estate until it is clear whether or not a live person has been born – and this happens only once the child is actually born or it is clear that he or she will not be born. Until then, the position is kept in abeyance with the result that no action by the parent on behalf of the *nasciturus* is required. It is only once the child has been born that the inheritance becomes available to the child and it is only once that has happened that adiation or repudiation (that is, acceptance or rejection) of the inheritance can occur. At that time the parent does have parental responsibilities and rights which empower him or her to adiate or repudiate on behalf of the child.[88]

(d) Dependant's action for loss of support

In *Chisholm v East Rand Proprietary Mines Ltd*[89] it was held that a child whose father was killed prior to his or her birth as a result of someone else's delict has a dependant's action for

82 Constitution s 9.

83 See also Kruger and Skelton (eds) *Persons* 25. Boezaart *Persons* 16 fn 36 (also Boezaart in Boezaart (ed.) *Child Law in South Africa* 8 fn 27) criticises the categorisation of the regulation of child maintenance in a divorce order as an application of the *nasciturus* fiction on a different ground. She argues that a child would in any event have a maintenance claim against his or her mother's ex-husband on the ground of the presumption of *pater est quem nuptiae demonstrant* and that it is therefore unnecessary to invoke the fiction. On the *pater est quem nuptiae demonstrant* presumption, see ch 5 below.

84 On the meaning and content of "parental responsibilities and rights", see ch 5 below.

85 But see Bosman and Van Zyl in Robinson (ed.) *Law of Children and Young Persons* 51.

86 On this issue, see below in this chapter.

87 The position of the *nasciturus* in respect of succession is discussed above in this chapter.

88 In the case of repudiation the court's consent is needed, too.

89 1909 TH 297.

damages for loss of support against the person who committed the delict. As far as maintenance is concerned, the child is put in the position in which he or she would have been had his or her father not been killed. A child may obviously also claim damages for loss of support from someone who killed his or her mother in an unlawful and culpable way while she was pregnant – provided, of course, that the child is born alive despite his or her mother's death.

Chisholm was the first South African case in which the *nasciturus* fiction was applied in the field of the law of delict. Several authors have submitted that the fiction should never have been extended to this field of the law.[90] Their criticism, which has found favour in the Supreme Court of Appeal,[91] is set out under the next heading below.

(e) Pre-natal injury

The issue of whether a child has an action for pre-natal injuries he or she suffered as a result of the wrongful act of a third party first came before the court in *Pinchin v Santam Insurance Co Ltd.*[92] The facts of the case were briefly as follows: a pregnant woman was seriously injured in a motor vehicle accident and her child was subsequently born with cerebral palsy. As a result of the cerebral palsy the child would never be able to care for himself. The child's father maintained that the child's brain injuries had been caused by the negligent conduct of the other vehicle's driver. Santam, the statutory insurer of the other party's vehicle, admitted that the driver had been negligent. In his personal capacity, the father claimed damages in respect of medical expenses regarding the child. On behalf of the child he also claimed satisfaction for the infringement of the child's personality rights.

The legal question was whether a person has an action for injury that was inflicted on him or her while he or she was still a *foetus* in his or her mother's womb. Judge Hiemstra stated that the only starting point in our common-law sources for the protection of the interests of the *foetus* was to be found in the *nasciturus* fiction. He quoted the texts from the *Digest*[93] that deal with the *nasciturus* fiction and mentioned that all the commentators related these texts specifically to the law of succession and the question of status, although none of them expressly limited the fiction to these fields of the law. He concluded that the principles of our law are flexible enough to extend the *nasciturus* fiction to the field of delict, and that, in principle, a child does have an action to recover damages for pre-natal injuries. However, because the facts of the particular case did not prove that the brain damage had been caused by the accident, the action was dismissed.

The court's view that the *nasciturus* fiction could be applied in the field of the law of delict proved to be controversial. Most authors are of the view that it is unnecessary to invoke the *nasciturus* fiction in circumstances such as those that arose in *Pinchin.*[94] They, quite correctly, submit that the question which arose in *Pinchin*'s case could have been solved without bringing the *nasciturus* fiction into the issue at all, because the ordinary principles of the law of delict would have given the child an action for pre-natal injuries anyway.[95] They

90 Most of these authors raise their objections in the context of *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), which is discussed under the next heading below.

91 *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA)).

92 1963 (2) SA 254 (W).

93 1.5.7, 1.5.26, 50.16.231.

94 See e.g. Boezaart *Persons* 21; Joubert 1963 *THRHR* 295; Lind 1992 *SALJ* 441–443; Mukheibir 2006 *Obiter* 188; Neethling 2006 *THRHR* 511; Knobel and Kruger 2006 *THRHR* 517; Scott 2006 *TSAR* 617.

95 See also *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) and *Friedman v Glicksman* 1996 (1) SA 1134 (W). In *Christian League* Steyn J in an *obiter dictum* indicated his agreement with the view that the ordinary principles of the law of delict could have been relied on in *Pinchin*'s case. In *Friedman*'s case Goldblatt J indicated that the *nasciturus* fiction (the judge referred to the *nasciturus* rule) would not be the basis for an action for wrongful life because the child's action arises, not when the pregnancy

continued

point out that all the elements of a delict need not be present at the same time and that it therefore does not matter that the conduct and its consequences (namely, the damage) do not manifest themselves at the same time. Thus the requirements of conduct and damage are met even if the disability from which the child suffers after birth was caused by the conduct of the driver before the child's birth. The fact that the child's disability only becomes evident after birth makes no difference: when the action is instituted after the child's birth the child is a legal subject who is suffering from a disability as a result of the driver's conduct, and on that basis the child has a delictual claim (provided of course that the other requirements of a delict[96] are satisfied).

Some authors, however, argue that the *nasciturus* fiction must be applied in order to give an action for pre-natal injury. One argument is that, according to the ordinary principles of our law, the unborn do not have legal personality and therefore have no rights that can be infringed by a delict. In other words, if the ordinary principles of our law were to be applied, the unborn would not have rights which could be infringed by the commission of a delict if the unlawful conduct occurred prior to birth. In order to afford the child an action after birth, his or her legal personality must accordingly be pre-dated to before his or her actual birth so that he or she has legal personality at the time of the conduct causing the injury.[97] Another argument is that, in the case of pre-natal injury, the conduct and the damage actually do occur at the same time, namely when the injury is inflicted, because the injury does not cause harm only once the child is born. The harm and resultant damage already start when the conduct occurs prior to birth; after birth the child simply continues to suffer damage.[98] In other words, when the child started to suffer damage he or she was not a legal subject and therefore the *nasciturus* fiction has to be applied to give him or her an action for pre-natal injury.

The Supreme Court of Appeal settled the issue in *Road Accident Fund v Mtati*[99] by holding that it is unnecessary to use the *nasciturus* fiction to grant a child an action in respect of pre-natal injuries. The facts of this case were similar to those of *Pinchin*. Here, too, a pregnant woman was injured in a motor vehicle accident and her child was subsequently born with brain damage and a mental disability. The child's father alleged that the accident had caused the child's injuries. He instituted a claim against the Road Accident Fund on the child's behalf. The Road Accident Fund raised a special plea against the claim. The Fund contended, firstly, that an unborn child is not a person and is therefore not entitled to compensation and, secondly, that because an unborn child is not a person, a driver does not owe a duty of care to it. The court *a quo* dismissed the special plea, whereupon the Fund appealed to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal. It held that the ordinary rules of the law of delict should be used to determine whether the child has a claim. The court held that the child's delictual right of action in respect of his or her pre-natal injuries becomes "complete"[100] when the child is born alive. Thus it is unnecessary and undesirable to employ the *nasciturus* fiction in the field of the law of delict.

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is not terminated, but when the child is born. (See also *Stewart v Botha* [2007] 3 All SA 440 (C), 2007 (9) BCLR 1012 (C), 2007 (6) SA 247 (C).) On the difference between the *nasciturus* fiction and the *nasciturus* rule, see below in this chapter.

96 The five elements of a delict are conduct, wrongfulness, fault, causation and damage.

97 Van der Vyver and Joubert 65; Mankga 2007 (2) *Codicillus* 52.

98 Boberg 16–17 fn 11. Keightley reiterates this opinion in the second edition of Boberg's work (Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 36 fn 15) and expresses the view that Boberg's "reasons remain cogent today".

99 2005 (6) SA 215 (SCA) (also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA)), Heaton *Casebook on the Law of Persons* case [2].

100 Par [39].

(f) Guardianship and care

Guardianship and care are two of the components of parental responsibilities and rights.[101] If a woman is pregnant when she gets divorced, the court may include an order regarding guardianship and care in the divorce order to obviate the necessity for further legal proceedings once the child has been born.[102] It is submitted that in these circumstances – as in the case of maintenance for a child who is born after his or her parents' divorce[103] – the court is not regulating parental responsibilities and rights in respect of the unborn; nor is it protecting the interests of the unborn by means of the *nasciturus* fiction. The court is merely, as a matter of convenience, regulating the position that will apply once the child has been born.

In *Friedman v Glicksman*[104] Judge Goldblatt held that a mother may not enter into a contract on behalf of her unborn child, because legal personality only begins at birth and an agent may not enter into a contract on behalf of a non-existent principal. It might be argued that the problem of the unborn child's being a non-existent principal could be solved by employing the *nasciturus* fiction. For example, if a pregnant woman, acting as her child's agent, entered into a contract which benefits the child, the *nasciturus* fiction might be invoked so that the unborn child could be considered as having been born at the time of his or her conception. The child would therefore be considered as having been in existence when the contract was concluded. However, it is submitted that this approach would be incorrect because it would require conferring parental responsibilities and rights on the parent prior to the child's actual birth. In the case of agency the authority of the agent to represent the principal is essential. Even if the unborn child were considered as having been born at the time of his or her conception, he or she would still be without the capacity to act as principal, for the child would be in the position of an *infans* (that is, a child below the age of seven years). As an *infans*, the child would have no capacity to act and could therefore not authorise his or her parent to act as his or her agent. Because of the child's lack of capacity to act, the parent would have to act on the child's behalf and authorise the agent to represent the child.[105] (In the above example the agent and the parent are one and the same person.) This the parent could do only if the parent had parental responsibilities and rights and, as indicated above, parental responsibilities and rights do not arise until a child is actually born.

If a parent wants to negotiate benefits for his or her unborn child, the solution lies in applying the mechanism of a *stipulatio alteri* (that is, a contract for the benefit of a third party).[106] This entails that the parent (A) enters into a contract with somebody else (B) in terms of which B undertakes to keep open an offer to contract with the unborn child (C) after his or her birth, or undertakes to make an offer to C after his or her birth. C is not a party to the contract; only A and B are parties to the contract. It accordingly does not matter that C does not exist yet.[107] Thus, for example, future spouses or civil union partners can agree in their antenuptial contract that children who may be born of their marriage or civil union will become entitled to specified property when they are born.[108] In the case of a contract for the benefit of a third party, C is benefited by being given the opportunity of entering into a contract with B. After C's birth, A (who then has parental responsibilities

101 On the meaning and content of "parental responsibilities and rights", see ch 5 below.
102 *Shields v Shields* 1946 CPD 242; *Pretorius v Pretorius* 1967 (2) PH B17 (O).
103 See above in this chapter.
104 1996 (1) SA 1134 (W).
105 A child's capacity to act is discussed in detail in ch 6 below.
106 On contracts for the benefit of a third person, see e.g. Kerr 85–97; Van Rensburg, Lotz and Van Rhijn *LAWSA* vol 9 *Contract* par 350; *Wille's Principles* 815–816.
107 See e.g. *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* 1904 AC 120.
108 See e.g. *Ex parte Balsillie et Uxor* 1928 CPD 218.

and rights) can accept or decline B's offer on behalf of C. Upon C's acceptance of the offer a contract comes into existence between B and C.[109]

(g) Termination of pregnancy

(i) *General*

As this is not an instance where the *foetus*' interests are protected on the premise that a child will eventually be born alive, termination of pregnancy (abortion) is not a topic that properly falls under a discussion of the *nasciturus* fiction. Nor is sterilisation.[110] However, these topics have traditionally been included in expositions relating to the *nasciturus* fiction, and that approach is adopted in this book, too.

The Choice on Termination of Pregnancy Act 92 of 1996 permits termination of pregnancy[111] on demand during the first 12 weeks of the gestation period, and on several grounds (including socio-economic considerations) after that. Regrettably the Act does not provide for compulsory counselling before or after the termination of pregnancy.[112]

(ii) *Circumstances in which a pregnancy may be terminated*

A pregnancy may be terminated at the request of the pregnant woman during the first 12 weeks of the gestation period.[113]

From the 13th up to and including the 20th week of the gestation period a pregnancy may be terminated if a medical practitioner, after consultation with the pregnant woman, is of the opinion that any of the following circumstances are present:

(1) The continued pregnancy will pose a risk of injury to the woman's physical or mental health.

(2) There is a substantial risk that the *foetus* will suffer from a severe physical or mental abnormality.

(3) The pregnancy resulted from rape or incest.

(4) The continued pregnancy will significantly affect the woman's social or economic circumstances.[114]

After the 20th week of the gestation period a pregnancy may be terminated only if a medical practitioner, after consultation with another medical practitioner or a registered midwife who has undergone the prescribed training course,[115] is of the opinion that the continued pregnancy will do any of the following:

(1) Endanger the woman's life.

(2) Result in a severe malformation of the *foetus*.

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109 See e.g. *Crookes v Watson* 1956 (1) SA 277 (A). In *Friedman*'s case the contract in issue was not one for the benefit of a third party, because the child "could only accept the benefit, if it be one, at a time when the alleged benefit, i.e. termination of pregnancy, was no longer possible" because the child had already been born (1140H).

110 In the case of termination of a pregnancy, the child will not be born and thus cannot meet one of the requirements for the application of the *nasciturus* fiction, namely that the child must eventually be born alive. In the case of sterilisation the *foetus* will never even be conceived (if the sterilisation is successful, that is). For other reasons why termination of pregnancy falls outside the scope of the law of persons in the strict sense, see Cockrell *Bill of Rights Compendium* par 3E4.

111 Termination of pregnancy refers to the separation and expulsion of the contents of the uterus of a pregnant woman by medical or surgical means: s 1. The termination of ectopic and extra-uterine pregnancies is thus not covered by the Act.

112 S 4 only obliges the state to "promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy".

113 S 2(1)(*a*).

114 S 2(1)(*b*).

115 The training course is prescribed by the regulations under the Choice on Termination of Pregnancy Act.

(3) Pose a risk of injury to the *foetus*.[116]

Only a medical practitioner may perform a termination after the 12th week of the gestation period. Until that time the termination may be performed by a medical practitioner, a registered midwife who has undergone the prescribed training course, or a registered nurse who has undergone the prescribed training course.[117]

(iii) *Consent*

A termination of pregnancy may only take place with the informed consent of the pregnant woman.[118] It must be stressed that, unless she is incapable of giving consent, no consent other than that of the pregnant woman is required.[119] In the case of a pregnant minor[120] the medical practitioner, midwife or nurse must, however, advise the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated, but the termination may not be denied if she prefers not to do so.[121] In the case of surrogate motherhood, the surrogate mother must inform the commissioning parent(s) of her decision. She must also consult with the commissioning parent(s) prior to the termination, but the decision on whether to proceed with the termination is hers alone.[122]

In *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus Curiae*)*[123] the provisions of the Act that allow a minor independently to consent to the termination of her pregnancy and merely require that she be advised to consult with her parents, guardian, family members or friends were constitutionally challenged. The plaintiff sought a declaratory order striking down the relevant provisions. The plaintiff *inter alia* alleged that a woman who is below 18 years of age is incapable of giving informed consent, and that she has to have the assistance of her parent or guardian when she decides whether or not to terminate her pregnancy. The plaintiff also alleged that allowing a pregnant minor independently to decide whether or not to have a termination violates her right to family or parental care and her right to be protected from maltreatment, neglect, abuse or degradation, does not render her best interests of paramount importance, and does not comply with the guarantee of equality before the law and equal

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116 S 2(1)(*c*). McQuoid-Mason 2006 *JJS* 121 argues that the restrictive provisions regarding termination of a pregnancy after the 20th week place an undue burden on rape and incest survivors. He submits that the exclusion of rape and incest as grounds for terminating a pregnancy after the 20th week is unconstitutional.

117 S 2(2). Any other person who performs a termination is guilty of an offence: s 10(1)(*a*) and (*b*). Anyone who prevents the lawful termination of a pregnancy or obstructs access to a facility that provides terminations also commits an offence: s 10(1)(*c*). On constitutional grounds, a health worker who has conscientious objections to terminating pregnancies may not be forced to participate in performing a termination: Ngwena 2000 *JJS* 37–39, 2003 *JJS* 1. On the negative experiences of women who (attempt to) access terminations of pregnancy at public health facilities, see Pickles 2013 *SAJHR* 515.

118 S 5(1). On the meaning of "informed consent" (incorrectly translated as *oorwoë toestemming* in the Afrikaans text of the Act) in the context of the Act, see Van Oosten 1999 *SALJ* 71–72. On the interface between the provisions of the Act and the Children's Act, see McQuoid-Mason June 2010 *SAJBL* 12.

119 S 5(2).

120 I.e. any female person under the age of 18 years: s 1.

121 S 5(3).

122 Children's Act s 300(2). If the termination takes place for medical reasons, the surrogate mother incurs no liability to the commissioning parent(s): s 300(3). If it takes place for other reasons, she has to refund payments made in respect of expenses that relate directly to her artificial fertilisation and pregnancy and the confirmation of the surrogate motherhood agreement, her loss of earnings as a result of the surrogate motherhood agreement, and her pregnancy-related death and disability insurance: s 301(2). She also has to reimburse the commissioning parent(s) for payments for *bona fide* professional legal or medical services with a view to the confirmation of the surrogate motherhood agreement or in the execution of the agreement: s 301(3). On surrogate motherhood, see further ch 5 below.

123 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)), Heaton *Casebook on the Law of Persons* case **[4]**.

protection and benefit of the law.[124] The defendant raised an exception against the plaintiff's particulars of claim on the ground that they did not disclose a cause of action.

The court pointed out that in the case of an exception to particulars of claim, the law requires that the allegations in the particulars of claim must be accepted as the truth.[125] Therefore, the plaintiff's allegation that a woman who is below the age of 18 years is incapable of giving informed consent must be accepted as true for purposes of deciding the exception. The court held that the cornerstone of the regulation of termination of a pregnancy under the Act is that the pregnant woman's informed consent is needed before a termination may be performed. The implication of the plaintiff's allegation that a woman who is below the age of 18 years cannot give informed consent is that such a woman does not qualify for a termination under the Act unless she has the assistance of her parent or guardian. Thus the Act actually does not permit a termination in the circumstances the plaintiff alleges and the plaintiff's particulars of claim therefore do not show a cause of action. The exception was accordingly upheld.

In *obiter dicta* the court further stated that the rights to bodily and psychological integrity (including the right to make reproductive decisions and the right to security in and control of one's body), dignity, privacy, and to have access to reproductive health care confer a right to termination on every woman, regardless of her age, since the Constitution of the Republic of South Africa, 1996 confers these rights on "everyone".[126] In support of its view that every woman has a constitutional right to terminate her pregnancy, the court further referred to the right to equality, the right not to be subject to unfair discrimination on the grounds of gender, sex and pregnancy, the right to life, and the right to freedom and security of the person.[127]

If a pregnant woman is mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of the termination of her pregnancy, or if she is in a state of continuous unconsciousness without a reasonable prospect of regaining consciousness in time to request and consent to the termination, and the gestation period is less than 21 weeks, her pregnancy may be terminated if her guardian, spouse or civil union partner consents.[128] In this case the grounds that were listed above in respect of terminations from the 13th up to and including the 20th week of the gestation period of a mentally able woman[129] must be present.[130] If the woman's guardian, spouse or civil union partner cannot be found, her *curator personae* (that is, the curator to her person)[131] may consent. In addition, two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course must consent to the termination.

In certain circumstances a mentally disabled or continuously unconscious woman's pregnancy may be terminated even without the consent of her guardian, spouse, civil union partner or *curator personae*. In this regard a distinction must be drawn between termination prior to the 21st week of the gestation period, and termination from the 21st week. Prior to the 21st week, the pregnancy may be terminated without the consent of the woman's guardian, spouse, civil union partner or *curator personae* if two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course are of the opinion that either of the following is present:

(1) The continued pregnancy will pose a risk of injury to the woman's physical or mental health.

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124 Constitution ss 28(1)(*b*), 28(1)(*d*), 28(2) and 9(1).

125 See e.g. *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N); *Van Zyl v Bolton* 1994 (4) SA 648 (C).

126 Constitution ss 12(2), 10, 14 and 27(1)(*a*).

127 Constitution ss 9(1), 9(3), 11 and 12(1).

128 Choice on Termination of Pregnancy Act s 5(4) read with s 13(2) of the Civil Union Act.

129 I.e. the grounds listed in s 2(1)(*b*) of the Choice on Termination of Pregnancy Act.

130 S 5(4).

131 On the appointment of a *curator personae*, see chs 7 and 8 below.

(2) There is a substantial risk that the *foetus* will suffer from a severe physical or mental abnormality.[132]

From the 21st week of the gestation period the woman's pregnancy may be terminated without the consent of her guardian, spouse, civil union partner or *curator personae* if two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course are of the opinion that the continued pregnancy will do any of the following:

(1) Endanger the woman's life.
(2) Result in a severe malformation of the *foetus*.
(3) Pose a risk of injury to the *foetus*.[133]

(iv) *The foetus' right to life and other constitutional issues surrounding termination of pregnancy*

Before the introduction of a Bill of Rights into our law,[134] our courts consistently held that a *foetus* is not a legal subject and does not have a right to life that can be enforced on its behalf. Thus, in *Christian League of Southern Africa v Rall*[135] an application for the appointment of a *curator ad litem* to represent the interests of a *foetus* in all matters concerning a termination of pregnancy was dismissed.[136] The court held that a child cannot have rights that can be enforced on his or her behalf before he or she is born alive, because it is only upon birth that the child becomes a legal subject.[137] Another example is *Van Heerden v Joubert*[138] where the court held that for purposes of the Inquests Act 58 of 1959 the word "person" does not include an unborn child. It was unnecessary for the court to decide whether a *foetus* should be regarded as a legal person or to what extent life before birth should be protected, but the court pointed out that serious problems might arise with regard to, for example, the law relating to termination of pregnancy, murder and culpable homicide if legal personality were extended to a *foetus*.

The view that a *foetus* does not have a right to life was criticised on various grounds, including moral, religious and legal ones. When the law relating to termination of pregnancy was liberalised by the Choice on Termination of Pregnancy Act after the enactment of the Bill of Rights it was inevitable that the Act would be challenged on constitutional grounds. This happened in *Christian Lawyers Association of South Africa v The Minister of Health*.[139] The plaintiffs contended that human life starts at conception and that the Choice on Termination of Pregnancy Act contravenes section 11 of the Constitution, which guarantees the right to life. They sought a declaratory order striking down the Act in its entirety. The defendants excepted to the plaintiffs' particulars of claim *inter alia* on the ground that it did not disclose a cause of action because section 11 of the Constitution does not confer any right on a *foetus*. Judge McCreath upheld the exception, holding *inter alia* that no provision of the Constitution bestows legal personality or protection on the *foetus*, and that the Constitution does not qualify a woman's right to make decisions about reproduction and her right to security in and control over her body[140] in order to protect the *foetus*.

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132 S 5(5)(*a*).
133 S 5(5)(*b*).
134 Ch 3 of the Constitution of the Republic of South Africa 200 of 1993 contained the first Bill of Rights, which came into operation on 27 Apr 1994. It was replaced when the Constitution of the Republic of South Africa, 1996 came into operation on 4 Feb 1997.
135 1981 (2) SA 821 (O).
136 But see *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255 (C) in which Seligson AJ said in an *obiter dictum* that "there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened" (259D). On the manner in which the Act takes the *foetus*' interest in its continued existence into account, see Pickles 2012 *PELJ* 403.
137 830A. On the issue of whether a *nasciturus* is a legal subject, see further below in this chapter.
138 1994 (4) SA 793 (A).
139 1998 (11) BCLR 1434 (T), 1998 (4) SA 1113 (T), Heaton *Casebook on the Law of Persons* case **[3]**.
140 These rights are enshrined in s 12(2) of the Constitution.

It is submitted that the outcome of the case is correct.[141] The law grants rights and obligations (including constitutional rights and obligations) only to legal subjects.[142] In the absence of a clear provision elevating the *foetus*' status to that of a legal subject, the Constitution cannot be said to have conferred any rights on the unborn.[143] An allegation that human life begins at conception is an insufficient basis on which to found the argument that a *foetus* has a right to life, because "human life" is not the determinant in respect of legal personality.[144]

Because the unborn do not have any rights, the issue of a conflict between a *foetus*' constitutional rights and those of the pregnant woman does not arise.[145] In the case of a conflict between a pregnant woman and the father of her unborn child about whether or not the pregnancy should be terminated, a constitutional challenge by the father of the provision in the Choice on Termination of Pregnancy Act which grants the woman the sole right to decide on the matter by requiring only her consent to the termination[146] would in all probability fail. Section 12(2)(*b*) of the Constitution entrenches every person's right to security in and control over his or her body, which clearly includes the person's reproductive powers. It therefore implies that a woman has the final say about whether or not she will terminate her pregnancy (or be sterilised or submit to *in vitro* fertilisation, etc.). Any limitation there may be of the father's right to make reproductive decisions would, in my view, be justifiable. From the point of view of dignity, privacy, and gender equality, too, it is submitted that the woman should have the final say in so far as reproduction is concerned.[147]

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141 McCreath J's approach and reasoning may, however, not have been correct in all respects: see e.g. Naudé 1999 *SAJHR* 541.

142 See ch 1 where the distinction between legal subjects and legal objects is set out.

143 See also Sinclair assisted by Heaton *Law of Marriage* 96 who made the point in relation to the interim Constitution (Constitution of the Republic of South Africa 200 of 1993). It applies equally to the final Constitution (Constitution of the Republic of South Africa, 1996).

144 That pre-natal human life may be worthy of protection is a different issue altogether. In this regard, state and community interests may be considered constitutionally justifiable limitations on the pregnant woman's rights. E.g., the limitations the Choice on Termination of Pregnancy Act imposes on termination of pregnancy after the 12th week of the gestation period are probably justifiable on the ground of state and community interests in protecting human life once that life has developed beyond a certain stage.

145 There may be a conflict between the woman's right to reproductive autonomy and state and community interests: see the preceding fn.

146 S 5(2).

147 Ss 10 and 14 of the Constitution respectively entrench the right to dignity and privacy. Gender equality is protected *inter alia* by the equality clause (s 9; see also the prohibition on sex and gender discrimination in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 6 read with the "prohibited grounds" in s 1(1), and s 8). Several other constitutional provisions could also be relied on in appropriate circumstances, such as freedom of conscience, religion, thought, belief and opinion (s 15(1)), the right to have access to reproductive health care services (s 27(1)(*a*)), and the right to participate in the cultural life of one's choice (s 30). See also *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus Curiae*)* 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)). In this case, the court stated, in *obiter dicta*, that a woman has a constitutional right to terminate her pregnancy. The court relied on the right to freedom and security of the person (s 12(1)), the right to bodily and psychological integrity (s 12(2)), the right to equality (s 9), the right to be free from unfair discrimination on the ground of gender, sex and pregnancy (s 9(3)), the right to dignity (s 10), the right to life (s 11), the right to privacy (s 14), and the right to have access to reproductive health care (s 27(1)(*a*)). The court, however, also indicated that a woman's right to terminate her pregnancy is not absolute. The state may legitimately regulate and limit the woman's right in order to protect pre-natal life, but such regulation and limitation may not amount to denying women the right to terminate their pregnancies. On the constitutional issues regarding termination of pregnancy, see further, e.g., Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 42–43 fn 24, 45 fn 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 10–11; Kruger and Skelton (eds) *Persons* 39; Birenbaum 1996 *SAJHR* 485; Meyerson 1999 *SALJ* 50; Naudé 1999 *SAJHR* 541; Ngwena 2000 *JJS* 19; Pickles 2012 *PELJ* 403.

Barring, perhaps, the invocation of the constitutional right to gender equality, the same arguments would apply in the case of same-sex relationships.[148]

(h) Sterilisation

The Sterilisation Act 44 of 1998 permits the voluntary sterilisation of anyone who has reached the age of 18 years and is capable of consenting.[149] This rule applies regardless of whether or not the person is married or a party to a civil union.[150] The person who is to be sterilised must give free and voluntary consent without any inducement. Before consenting, the person must receive a clear explanation and adequate description of the proposed plan of the sterilisation procedure and the consequences, risks and reversible or irreversible nature of the procedure, and be advised that consent may be withdrawn any time before the sterilisation takes place. Once this has been done, consent must be given on a prescribed form.[151]

A minor may be sterilised only if failure to perform the sterilisation would jeopardise his or her life or seriously impair his or her health.[152] The sterilisation may only be performed with the consent of the minor's parent, guardian or curator.[153] Furthermore, an independent medical practitioner must consult the minor and provide a written report that indicates that the sterilisation is in the minor's best interests.[154] The desirability of the sterilisation must also be evaluated by a panel consisting of a psychiatrist (or a medical practitioner if no psychiatrist is available), psychologist or social worker, and a nurse.[155]

The Act also contains specific provisions regarding the sterilisation of a person who is incapable of consenting or incompetent to consent. Such a person may be sterilised only if he or she is mentally disabled[156] to such an extent that he or she is incapable of all of the following:

(1) Making an independent decision about contraception or sterilisation.

(2) Developing mentally to a sufficient degree to make an informed decision about contraception or sterilisation.

(3) Fulfilling the parental responsibilities associated with giving birth.[157]

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148 It might be argued that because the parties to a same-sex civil union belong to the same sex, gender equality issues cannot arise. It must, however, be borne in mind that sex and gender are different matters. "Sex" refers to the biological fact of being a man or a woman, while "gender" refers to the roles and differences ascribed to men and women through socialisation. E.g. a woman's sex entails that only she can fall pregnant, while her gender entails that it is expected of her (rather than her male partner) to fulfil (the major part of) child-care responsibilities. In a same-sex relationship the same gender stereotypes can arise. Thus it can, e.g., be expected of a stay-at-home partner or the partner who is not the main breadwinner to meet the expectations that society usually has in respect of women. It is quite possible that applying these stereotypes and expectations in a same-sex union will result in the same disadvantage, discrimination and inequality that operate in many heterosexual relationships. In such event, the gender equality argument could be invoked in same-sex relationships, too.

149 S 2(1).

150 In the case of a conflict between a couple as to whether one of them will be sterilised, a constitutional challenge of the provision that requires only the consent of the party who is to be sterilised would, it is submitted, fail for reasons similar to those that are advanced above in respect of termination of pregnancy.

151 S 4.

152 S 2(3)(*a*).

153 Sterilisation Act s 2(3)(*b*) read with ss 2(3)(*c*)(i) and 3(1)(*a*). On a minor's capacity to consent to medical treatment and operations, see further ch 6 below.

154 S 2(3)(*c*)(ii).

155 S 2(3)(*b*) read with s 3(2).

156 S 3(7) defines "mental disability" as "a range of functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to restrained sensory and motor functioning and requiring nursing care".

157 S 3(1)(*c*).

If these requirements are met, the consent of the person's parent, spouse, civil union partner, guardian or curator must be obtained[158] and a panel consisting of a psychiatrist (or a medical practitioner if no psychiatrist is available), psychologist or social worker, and a nurse must concur that the sterilisation may be performed.[159] When considering whether the sterilisation may be performed the panel must take all relevant facts into account, including:

(1) The person's age.
(2) The person's mental and physical health and well-being.
(3) Whether there are other safe and effective alternatives to sterilisation.
(4) The potential effect of sterilisation on the person's mental and physical health and well-being.
(5) The nature of the sterilisation procedure that is to be performed.
(6) The likelihood that the person will become capable of consenting.
(7) Whether the sterilisation is in the person's best interests.
(8) The benefit the person may derive from the sterilisation.[160]

Whenever a sterilisation is performed the method holding the smallest risk to the patient's health must be used.[161]

2.3.3 Does the protection of the *nasciturus*' interests imply that an unborn human being is sometimes a legal subject?

At the beginning of this chapter it was explained that a natural person's legal personality begins at birth. The protection of the interests of the *nasciturus*, however, gives rise to the question of whether our law recognises an unborn child as a legal subject in some instances. In other words, does the protection that a *nasciturus* enjoys when its interests are at stake mean that our law recognises an exception to the rule that legal personality begins at birth? To find an answer to this question one must distinguish between the so-called *nasciturus* rule and the *nasciturus* fiction.

On the one hand there are jurists[162] who maintain that the protection afforded to the unborn is based on the *nasciturus* rule and not on a fiction. The rule is that whenever a situation arises where it would have been to the advantage of the *nasciturus* had he or she already been born, all rights that are conferred upon people who have already been born alive are also conferred on the *nasciturus*. From this it logically follows that a *nasciturus* is a legal subject as from the date of his or her conception whenever his or her interests are at stake. Accordingly, legal personality sometimes begins at birth and sometimes (namely, when this benefits the *nasciturus*) it begins at conception. In other words, live birth is the usual point at which legal personality is obtained, but in exceptional cases (namely, when this benefits the *nasciturus*) legal personality may be antedated to the time of the *nasciturus*' conception.

Other jurists prefer to view the protection of the *nasciturus* in terms of a fiction. They either describe it as the *nasciturus* fiction, or they say that it is the *nasciturus* rule which operates by way of a fiction.[163] In terms of the *nasciturus* fiction, the *nasciturus* is regarded as

158 S 3(1)(*a*) of the Sterilisation Act read with s 13(2) of the Civil Union Act.
159 Sterilisation Act s 3(1)(*b*) and (2).
160 S 3(1)(*b*).
161 S 3(5).
162 Van der Vyver and Joubert 65–66; Van der Merwe 1963 *THRHR* 293–295; Van der Vyver 1981 *THRHR* 306 *et seq*; Du Plessis 1990 *TSAR* 49–50.
163 See e.g. Boezaart *Persons* 14; Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 30 fn 6, 37–38 fn 15; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 3, 4; Kruger and Skelton (eds) *Persons* 23; Schäfer *Child Law* 32; Schäfer in Clark (ed.) *Family Law Service* par E6; Spiro *Parent and Child* 37; Davel 1981 *De Jure* 362. See also Hahlo 1974 *SALJ* 75. In *Christian*

continued

having been born at the time of his or her conception if a situation arises where it would have been to his or her advantage had he or she already been born. In terms of this view, it is not the protection of the "rights" of the *nasciturus* that are at issue, but the protection of the rights of the child who will be born later – hence the qualification that the *nasciturus* is regarded as having been born only if a living child is indeed born. If the child is not born alive, the protection falls away completely and it is as if there never was a *nasciturus*. Thus the interests involved are those of the child yet to be born, and the only practical way in which these interests can be protected before birth is to keep them open for the child until he or she is born. The *nasciturus* fiction is but an awkward way in which this interim protection is expressed. Seen in this light there is no need to regard the *nasciturus* as a legal subject in some cases, but not in others. Thus a single rule applies in respect of the beginning of legal personality, namely that legal personality begins at birth. The *nasciturus* fiction simply deems birth to have taken place at the time of conception when this is to the advantage of the *nasciturus*.

Those who favour the version of the *nasciturus* rule that operates by way of a fiction achieve the same result by arguing that the *nasciturus* rule operates as a fiction that deems the *nasciturus* to have been born at the time of his or her conception if a situation arises where it would have been to the *nasciturus*' advantage had he or she already been born. In other words, this version of the *nasciturus* rule is simply the *nasciturus* fiction by another name. Unlike the version of the *nasciturus* rule that was set out in the previous paragraph, this version of the *nasciturus* rule does not antedate legal personality to the time of conception.

I support the *nasciturus* fiction. It is submitted that, to avoid confusion, the term "*nasciturus* rule" should be reserved for the view that our law recognises an exception to the rule that legal personality begins at birth, and that the term "*nasciturus* fiction" should be reserved for the view that legal personality always begins at birth and that when the *nasciturus*' interests are protected it is the child's birth that is fictionally antedated.

2.4 The end of legal personality

2.4.1 General

A person's legal personality is terminated by death. Therefore, dead people have neither rights nor obligations. Nevertheless, the law protects the deceased's body and regulates its disposal.[164] This is done because of community interests (such as public health, respect for the feelings and sensibilities of the deceased's relatives, and respect for the dead).[165] The

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League of Southern Africa v Rall 1981 (2) SA 821 (O) the court expressed the view that the protection of a *foetus* is founded on a fiction (829G–830B). This view is correct. However, as Bedil 1981 *SALJ* 464 correctly points out, either approach would have yielded the same results in the South African cases in which the *nasciturus*' interests have been at issue. Even in *Rall*'s case it would not have made any difference had the court based the protection of the *foetus* on the *nasciturus* rule instead of the *nasciturus* fiction, because the rule – like the fiction – cannot operate in the case of termination of a pregnancy because the rule is predicated upon subsequent live birth; see also *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W). In *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA)) the Supreme Court of Appeal referred to the *nasciturus* rule as a fiction. On the distinction between the *nasciturus* fiction and rule, see further Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 37 fn 15; Nöthling-Slabbert 1997 (1) *Codicillus* 56–57; Knobel and Kruger 2006 *THRHR* 521.

164 Committing a sexual act with a corpse is a crime in terms of s 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Violating a grave and violating a corpse are common-law crimes: see e.g. *S v Coetzee* [1993] 4 All SA 531 (T); Boezaart *Persons* 177; Mahler-Coetzee in Barratt (ed.) *Persons and the Family* 149–150; Skeen *LAWSA* vol 6 *Criminal Law* par 226. Keeping a pregnant, brain-dead woman on life-support until her *foetus* is born, would amount to violating a corpse: McQuoid-Mason Aug 2014 *SAMJ* 554; McQuoid-Mason Nov 2014 *SAJBL* 44.

165 See e.g. *R v Sephuma* 1984 (3) SA 982 (T); Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 52; Labuschagne 2001 *De Jure* 354.

deceased's former assets are also protected, but once again not in the deceased's own interests but in the interests of his or her creditors and heirs.

Prior to the coming into operation of section 1 of the National Health Act 61 of 2003, South Africa lacked a legal definition of "death". When the legislature enacted this Act, it adopted the criterion of brain death as the legal standard in so far as the provision of health services, donation of corpses or specified tissue in corpses (such as specific organs), post-mortem examinations, and the removal of tissue at post-mortem examinations are concerned.[166] Using brain death as the criterion for determining when a person is legally dead is in keeping with the prevailing view in modern medical practice on when death occurs.[167] It should, however, be borne in mind that the definition of "death" in the National Health Act applies only to the specific matters governed by the Act. Thus the courts are not bound by the definition in circumstances where the Act does not apply. In those circumstances they may, as in the past, rely on any medical evidence to establish whether someone has died and to determine the moment of death, although the definition in the Act will probably have persuasive force because it reflects the predominant medical view.

2.4.2 Proof of death

In private law, proof of death is important for two reasons: once death has been proved, the deceased's estate may be administered and distributed, and the surviving spouse or civil union partner may enter into a new marriage or civil union.

The usual way to prove a person's death is by means of presenting a certificate that has been issued by a medical practitioner. If the death was due to natural causes, the certificate indicates the cause of death.[168] If the death was due to, or is suspected to have been due to, unnatural causes, an inquest is held.[169] In such event, the medical practitioner must, as soon as he or she is satisfied that the corpse is no longer needed for the inquest, issue a certificate to that effect.[170] In this case, the cause of death is not stated.

Once a death has been reported to the Director-General of Home Affairs and registered[171] the Director-General issues an official death certificate.[172] The death certificate is *prima facie* proof of the person's death.[173]

2.5 Presumption of death

If a person disappears and there is no certainty as to whether he or she is dead or still alive, a presumption of death can be pronounced in terms of the common law or, in certain instances, in terms of statute.

2.5.1 Common-law procedure

In terms of the common-law procedure, any interested party – for example, a creditor of the missing person, or the person's heirs or surviving spouse or civil union partner – may approach the High Court in whose jurisdiction the missing person was domiciled at the time of his or her disappearance to grant an application for an order presuming the

166 See the definition of "death" in s 1 of the Act, read with ss 7(1)(*e*), 62, 66 and 67.

167 On the medical theories as to when death occurs, see Boezaart *Persons* 161–162; Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 50 fn 59; Kruger and Skelton (eds) *Persons* 43–44; Mahler-Coetzee in Barratt (ed.) *Persons and the Family* 134–136; Hunt 1968 *SALJ* 200; Le Roux-Kemp 2008 *Obiter* 260. On societal norms and values and controversies as to brain death as the moment of death, see Le Roux-Kemp 2013 *CILSA* 74.

168 Births and Deaths Registration Act s 15(1) and (2).

169 On inquests, see further below in this chapter.

170 S 17(2).

171 Ss 14, 15 and 17. On the registration of a death, see further below in this chapter.

172 Births and Deaths Registration Act s 22; Identification Act 68 of 1997 s 13(1).

173 Births and Deaths Registration Act s 28(2); Identification Act s 13(1).

person's death.[174] The case is brought by way of an application.[175] The applicant must prove on a preponderance of probabilities that the missing person is dead.[176]

Initially our law followed the English rule according to which an order presuming a person's death is granted after an absence of seven years.[177] This was superseded by the rule that no fixed period of time is required.[178] Naturally the length of a person's absence is a factor that is taken into account by the court and it can even be decisive, but it is not the only factor. As the court indicated in *Ex parte Estate Russell*,[179] other factors are also relevant:

> [B]efore coming to any conclusion the Court must take into consideration certain factors – the age of the person presumed to be dead, the length of his absence from home, the trade or occupation of such person, whether he followed an ordinary peaceful occupation or whether he was engaged in a business or trade to which ordinarily risk or danger was attached . . . but in the absence of any evidence to indicate that the person presumed to be dead was engaged in an occupation that endangered life, the mere fact of his not having been heard of for any number of years is not sufficient to authorise the Court to come to the conclusion that his death must be presumed.

On occasion, even an absence of 30 years was considered insufficient reason for pronouncing a presumption of death.[180] In contrast, the presumption can be pronounced after a short absence if the probability of death is very strong.[181]

The fact that the missing person would have reached an advanced age at the time of the application can be important,[182] as can the fact that the person was in bad health at the time of his or her disappearance[183] or that he or she manifested suicidal inclinations.[184]

A person's death is not presumed lightly and it is thus required that the applicant bring all the relevant facts and circumstances to the attention of the court.[185]

It has apparently become firm practice for the court, after hearing the application, to set a return date on which the final order will be made. The applicant is then ordered to give notice of the rule *nisi* to those interested parties indicated by the court, and to publish the rule *nisi* in the *Government Gazette* and a newspaper in circulation in the area where the missing person used to live. This enables other interested parties to object to the granting of the final order or to bring further facts to the notice of the court which could either rebut the presumption of death or strengthen it.[186]

2.5.2 Statutory procedure

Section 5(2) of the Inquests Act 58 of 1959 stipulates that if a magistrate is of the opinion that a person's death was not due to natural causes, he or she must take the necessary steps to ensure that an inquest as to the circumstances and cause of the death is held by a judicial

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174 *Ex parte Maclean* 1968 (2) SA 644 (C).

175 But see *Kakuva v Minister van Polisie* 1983 (2) SA 684 (SWA) where the court was unable to decide the case on the papers before it. It referred the matter for trial so that oral evidence could be heard.

176 *Ex parte Rungasamy* 1958 (4) SA 688 (D); *Ex parte Rookminia: In re Sardha* 1964 (4) SA 163 (D).

177 *In re Booysen* 1880 Foord 187.

178 *Re Beaglehole* 1908 TS 49, Heaton *Casebook on the Law of Persons* case **[5]**.

179 1926 WLD 118 120. See also *In re Cuthbert* 1932 NPD 615; *Ex parte Heard* 1947 (1) SA 236 (C); *Ex parte Pieters* 1993 (3) SA 379 (D), Heaton *Casebook on the Law of Persons* case **[6]**; *Ex parte Govender* 1993 (3) SA 721 (D); *Ex parte Stoter* 1996 (4) SA 1299 (E), Heaton *Casebook on the Law of Persons* case **[7]**.

180 *Ex parte Verster* 1956 (1) SA 409 (C).

181 *Ex parte Dorward* 1933 NPD 17; *Ex parte Heard* 1947 (1) SA 236 (C); *In re Labistour* 1908 NLR 227; *Ex parte Alexander* 1956 (2) SA 608 (A); *Ex parte James* 1947 (2) SA 1125 (T); *Dempers and Van Ryneveld v SA Mutual Co* (1908) 25 SC 162; *Ex parte Engelbrecht* 1956 (1) SA 408 (E); *Ex parte Thesen's Steamship Co Ltd* 1944 CPD 165.

182 *Ex parte Panaar* 1908 CTR 544; *Ex parte Rungasamy* 1958 (4) SA 688 (D).

183 *In re Kirby* (1899) 16 SC 245.

184 *Ex parte Gerdener* 1933 CPD 29; *Ex parte Govender* 1993 (3) SA 721 (D).

185 *Ex parte Parker* 1947 (3) SA 285 (C).

186 *Ex parte Parker* 1947 (3) SA 285 (C); *Ex parte Rungasamy* 1958 (4) SA 688 (D); *Ex parte Pieters* 1993 (3) SA 379 (D).

officer in terms of section 6.[187] If the person's corpse is available, the district surgeon or another medical practitioner examines it in order to determine the cause of death.[188] If it appears at the inquest that the person's body has not been found, or has allegedly been destroyed, and the evidence proves beyond reasonable doubt that the person is dead, the judicial officer must record his or her findings in respect of:

(1) The deceased's identity.

(2) The cause or likely cause of death.

(3) The date of death.

(4) Whether the death was caused by any act or omission which *prima facie* involved or amounted to an offence by anyone.[189]

If the judicial officer is unable to record such a finding, this fact must be recorded.[190] If a finding regarding the deceased's identity and date of death has been recorded, the record of the inquest, together with any comment the judicial officer wishes to make, is submitted for review to the division of the High Court that has jurisdiction in the area where the inquest was held.[191] If the finding is confirmed, the effect is the same as if the High Court had made an order presuming the person's death.[192]

Two aspects of the Inquests Act must be emphasised. First, it is clear that the state takes the initiative because an unnatural death is suspected. Therefore it is not necessary for a private person to approach the court for a presumption of death. However, section 18(3) provides that the procedure laid down in the Act does not affect the court's common-law jurisdiction to grant an order presuming the death of any person. Secondly, section 16(1) provides that the judicial officer must be certain beyond *reasonable doubt* that the person is dead before he or she may record a finding that the person is presumably dead. This differs from the common-law procedure where an order may be granted if it is proved on a balance of probabilities that the person is dead. There is thus a big difference in the *onus* of proof and it would obviously be easier to obtain an order presuming death in terms of the common-law procedure.

2.5.3 The effect of an order of presumption of death

(a) Rebuttable presumption

If the court pronounces a presumption of death, this obviously does not mean that the person is dead.[193] There is only a rebuttable presumption that the person is dead.

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187 As far as the procedure is concerned, it was held in *Marais v Tiley* 1990 (2) SA 899 (A) that a public inquest with oral evidence is the general rule. See also s 10. In terms of the Inquests Act, an inquest may only be held into the death of a "person". For purposes of the Act the word "person" does not include an unborn child: *Van Heerden v Joubert* 1994 (4) SA 793 (A). Thus an inquest cannot be held into the death of a stillborn child.

188 S 3(2).

189 S 16; see also *Van Heerden v Joubert* 1994 (4) SA 793 (A); *Padi v Botha* 1996 (3) SA 732 (W).

190 S 16(3).

191 S 18(1).

192 S 18(2) and 18(2A).

193 Van der Vyver and Joubert 426 correctly submit that the courts are sometimes too hesitant to grant an order presuming death. They ascribe this hesitancy to the fact that the courts do not distinguish between a declaration and a presumption of death. E.g., in *In re Kannemeyer: Ex parte Kannemeyer* (1899) 16 SC 407 408, Heaton *Casebook on the Law of Persons* case **[8]** it was said that it "is in the highest degree probable" that the person concerned was dead "but there is no legal presumption to that effect. The Court cannot, therefore, declare him to be dead". The authors point out that a court cannot declare a person to be dead; it can only pronounce a presumption of death and this it can do if it is convinced on a preponderance of probabilities that the person is dead. See also Boezaart *Persons* 167; Kruger and Skelton (eds) *Persons* 47, 51.

(b) Distribution and administration of the missing person's estate

After a death has been presumed, the person's estate may, in principle, be dealt with as if he or she were dead. Thus his or her estate can be administered and divided among his or her heirs. The courts have, however, on occasion adopted a cautious attitude and have ordered that while the estate may be divided, the heirs must furnish security for the restoration of the property, or its value, should the missing person return.[194]

If the court decides that the circumstances of a particular case do not justify granting an order presuming death, it may none the less order that the missing person's property be divided among his or her heirs provided that they furnish sufficient security for the return of the property or its value, should the missing person reappear.[195] The court may also appoint a *curator bonis* to administer the missing person's affairs without pronouncing a presumption of death.[196]

(c) Dissolution of the missing person's marriage or civil union

Because an order presuming someone's death does not automatically terminate his or her marriage, great uncertainty existed in the past concerning the surviving spouse's remarriage.[197] At present the Dissolution of Marriages on Presumption of Death Act 23 of 1979 regulates the position.[198] This Act applies to the dissolution of civil unions, too.[199]

Section 1 of the Act reads as follows:

> Any provincial or local division of the Supreme Court of South Africa [now the High Court] making an order that the death of any married person shall be presumed, may, when making that order or at any time thereafter, on the application of such person's spouse, make an order that the marriage in question shall be deemed to have been dissolved by death as from a date determined by the court, whereupon that marriage shall for all purposes be deemed to have been dissolved by death as from the date so determined.

The court that pronounces a presumption of death is thus empowered to make an order dissolving the person's marriage or civil union at the same time that the presumption of death is made, or at any time thereafter. In other words, a separate application for an order dissolving the marriage or civil union may be made. The court may not grant the order on its own initiative. It may only do so on the application of the surviving spouse or civil union partner.

The court is not bound to grant the application. It has a discretion in the matter, but it is improbable that a court would be prepared to issue a presumption of death but refuse to dissolve the missing person's marriage or civil union.

The result of the order is that the marriage or civil union is deemed to have been dissolved by death for all purposes. In other words, the personal and patrimonial consequences of the dissolution are exactly the same as if the marriage or civil union were dissolved by the death of one of the parties.

Section 2 of the Act regulates the position where an inquest was held and a finding was made in terms of the Inquests Act.[200] If the High Court confirms the finding, the person's marriage or civil union is deemed to have been automatically dissolved as from the date recorded in the court's finding as the date on which the person died. In this case – unlike

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194 *Ex parte Estate Russell* 1926 WLD 118; *Ex parte Davids* 1948 (1) SA 1018 (W).

195 *In re Kannemeyer: Ex parte Kannemeyer* (1899) 16 SC 407; *Re Nicolson* 1908 TS 870; *Ex parte Halbert* 1912 CPD 706; *In re Cuthbert* 1932 NPD 615; *Ex parte Davids* 1948 (1) SA 1018 (W). See further *Ex parte Pieters* 1993 (3) SA 379 (D) where the amount to be distributed was so small that the court dispensed with security.

196 *In re Widdicombe* (1929) 50 NLR 311. On the appointment of a *curator bonis*, see further ch 8 below.

197 *In re Booysen* 1880 Foord 187; *Ex parte Ziedler* 1897 HCG 136; *Ex parte Halbert* 1912 EDL 167; *Ex parte Kerkhof* 1924 TPD 711.

198 On the Act, see further Nathan 1979 *SALJ* 439; Stoop 1979 *Codicillus* 12; Pauw 1980 *THRHR* 71.

199 Civil Union Act s 13(2).

200 On the Inquests Act, see above in this chapter.

under the common-law procedure – no special application for the dissolution of the marriage or civil union need be made.

2.5.4 Setting aside an order of presumption of death

As a presumption of death is rebuttable, the court that pronounced the presumption may set aside the original order if, on the basis of further evidence, it becomes clear that the person who was presumed dead is in fact alive.[201]

Any interested person, including the "missing" person, may approach the court for an order that the person's estate not be further divided and that the order presuming his or her death be set aside. Anyone who has received benefits must return either the benefits or their value. Should they fail to do so, they can be sued by means of an enrichment action, namely the *condictio indebiti*.[202]

Finally, it must be mentioned that only the High Court of the area where the missing person was domiciled at the time of his or her disappearance has jurisdiction to set aside an order presuming his or her death.[203]

2.6 Presumptions regarding sequence of death

If several people die in the same disaster, it may be important to establish which of the *commorientes* (that is, persons who die together) died first in order to determine whether one inherited from the other. This is so because one person can only inherit from another if he or she is alive at the time of the other person's death.

The general rule is that if the sequence in which people died cannot be proved on a balance of probabilities, there is no presumption either of survival or simultaneous death.[204] However, unless there is evidence to the contrary, the courts will find that *commorientes* died simultaneously.[205] After all, if there are no witnesses to testify that one person died before the other, the court can hardly do anything else but find that they died simultaneously.

2.7 Registration of deaths

The Births and Deaths Registration Act requires every death to be reported to the Director-General of Home Affairs (or the Director-General's duly appointed representative). This applies irrespective of whether the death was due to natural or unnatural causes.[206] Notice must also be given of a stillbirth.[207]

If someone died of natural causes, anyone who was present at the death, became aware of it, or is in charge of the person's funeral must notify the Director-General.[208] If it is suspected that the deceased died of unnatural causes, the Director-General, or the medical practitioner who attended the deceased before his or her death or examined the corpse must report the matter to the police.[209] An inquest will then be held in terms of the Inquests Act.[210]

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201 *Berger v Aiken* 1964 (2) SA 396 (W). In this case it was said that a court "has jurisdiction to alter an order presuming death, because it is of a provisional nature" (400H).

202 *Berger v Aiken* 1964 (2) SA 396 (W).

203 *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147.

204 See in general *Nepgen v Van Dyk* 1940 EDL 123; *Ex parte Martienssen* 1944 CPD 139; *Ex parte Chodos* 1948 (4) SA 221 (N); *Ex parte Graham* 1963 (4) SA 145 (D), Heaton *Casebook on the Law of Persons* case **[9]**. See also *Greyling v Greyling* 1978 (2) SA 114 (T).

205 See the cases referred to in the previous fn and Hahlo and Kahn *South Africa* 348.

206 Ss 14, 15 and 17.

207 S 18. See also above in this chapter.

208 S 14(1).

209 Ss 14(3), 14(4) and 15(3).

210 Births and Deaths Registration Act s 16; Inquests Act s 2(1). The Inquests Act is discussed above in this chapter. For a critical discussion of the inadequacies of the Act and the reporting mechanisms it provides for, see Theophilopoulos and Tuson 2016 *Stell LR* 161.

In the case of a stillbirth, the medical practitioner who was present at the stillbirth or examined the stillborn child's corpse must notify the Director-General.[211] If no medical practitioner was present or examined the child's corpse, the duty falls on anyone who was present at the stillbirth.[212]

2.8 Duty to bury the deceased

No one may be buried or cremated before a burial order has been issued in terms of the Births and Deaths Registration Act. A burial order is issued only once the prescribed notice of death or stillbirth has been given.[213]

If the deceased left written, or even verbal, instructions regarding his or her funeral and/or burial place or cremation, those instructions must be complied with as far as possible and permissible.[214] In the case of verbal instructions, there must be clear proof of those instructions – especially if they contradict written instructions the deceased gave at a different time.[215]

If the deceased did not give any instructions, his or her heirs have the right and duty to make the funeral or cremation arrangements and to determine the deceased's last resting place.[216] It has been held that if there are multiple heirs with conflicting wishes, the surviving spouse has a "paramount right" to decide on the funeral or cremation arrangements and the deceased's last resting place,[217] but this approach has not been followed consistently. For example, in the South Eastern Cape Local Division (now the Eastern Cape Local Division, Port Elizabeth) it has been held that the court should have regard to various factors, including the deceased's family relationships, the wishes of the surviving spouse, the wishes of the deceased's children, the wishes of the deceased's broader family, and practical considerations.[218] In the former Transvaal the outcome of the dispute has been determined by fairness and propriety.[219]

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211 Births and Deaths Registration Act s 18(1).

212 Births and Deaths Registration Act s 18(2).

213 S 20(1). Notice of a stillbirth can only be given in respect of a *foetus* that has had at least 26 weeks of intrauterine existence: s 20(1) read with the definitions of "still-born" and "still-birth" in s 1. Consequently, a burial order cannot be issued and foetal remains cannot lawfully be buried if the *foetus* did not survive for at least 26 weeks: Slabbert 2017 *THRHR* 104. Instead, such foetal remains are disposed of as so-called "medical waste": For a critical evaluation of this position, and a plea for reform, see Slabbert *ibid.*

214 See e.g. *Saiid v Schatz* 1972 (1) SA 491 (T); *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk); *Mankahla v Matiwane* 1989 (2) SA 920 (C); *Mnyama v Gxalaba* 1990 (1) SA 650 (C); *Mabula v Thys* 1993 (4) SA 701 (SEC). But see also *Human v Human* 1975 (2) SA 251 (E); *Tseola v Maqutu* 1976 (2) SA 418 (Tk); *Mbanjwa v Mona* 1977 (4) SA 403 (Tk) and *Gonsalves v Gonsalves* 1985 (3) SA 507 (T) where, invoking the rule of evidence in terms of which hearsay evidence is inadmissible, verbal instructions were ignored. Generally on the duty to bury the deceased, see Boezaart *Persons* 175–177; Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 53 fn 61; Kruger and Skelton (eds) *Persons* 53–54; Boberg 1975 *Businessman's Law* 222; Mqeke 1987 *Transkei LJ* 255; Cassim 1993 *De Rebus* 533; Labuschagne 2001 *De Jure* 354–357; Mokotong 2001 *THRHR* 297; Bekker, Labuschagne and Boonzaaier 2004 *De Jure* 215–217; Mokotong 2008 *De Jure* 616; Slabbert 2016 *De Jure* 230. On the conflict between the customary and common-law principles on burial rights, see Prinsloo 1991 *TSAR* 665; Bekker, Labuschagne and Boonzaaier 2004 *De Jure* 203.

215 See e.g. *Mabula v Thys* 1993 (4) SA 701 (SEC); *Gabavana v Mbete* [2000] 3 All SA 561 (Tk) and the three unreported decisions Mokotong 2001 *THRHR* 297 refers to at 300.

216 See Voet 11.7.7; *Human v Human* 1975 (2) SA 251 (E); *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk); *Mankahla v Matiwane* 1989 (2) SA 920 (C); *Mabula v Thys* 1993 (4) SA 701 (SEC); *Gabavana v Mbete* [2000] 3 All SA 561 (Tk).

217 *Tseola v Maqutu* 1976 (2) SA 418 (Tk).

218 *Mahala v Nkombombini* 2006 (5) SA 524 (SEC).

219 *Gonsalves v Gonsalves* 1985 (3) SA 507 (T); *Finlay v Kutoane* 1993 (4) SA 675 (W); *Trollip v Du Plessis* 2002 (2) SA 242 (W).

3

STATUS

3.1 Introduction

In chapter 1 it was indicated that the law of persons is that part of private law which *inter alia* determines the legal status of a legal subject. For a proper grasp of the law of persons it is therefore very important that the meaning of the concept "status" be understood.

The word "status" is derived from the Latin verb *stare* (that is, to stand) which in itself is a good indication of what is meant by "status". Here we are concerned with a person's "standing" in the law. This "standing" is determined by all those attributes a person has, or the condition in which he or she finds himself or herself to which the law attaches consequences.[1] In private law the most important attributes or factors which determine a person's status are domicile, birth outside marriage, youth, physical illness or incapacity, mental illness or incapacity, intoxication, prodigality and insolvency. These factors will be discussed in more detail in the chapters that follow.

To properly grasp the concept "status" and its implications, one has to understand what capacities a legal subject can have. These capacities flow directly from the law in the objective sense (*objektiewe reg*) and are sometimes referred to as *kompetensies* or competences. These capacities do not arise as a result of a person's rights in respect of legal objects (*subjektiewe regte*) and must be distinguished from the powers that the holder of a right has in respect of the object of the right (that is, the so-called *bevoegdhede* or *inhoudsbevoegdhede* of the person who holds the right, such as that the owner is entitled to use, enjoy, and dispose of his or her property).[2]

The most important capacities that are traditionally distinguished are legal capacity, capacity to act and capacity to litigate (that is, *locus standi in iudicio*). In broad outline these capacities refer to the capacity, firstly, to have rights and duties (that is, legal capacity); secondly, to perform juristic acts by which rights and duties are acquired or disposed of (that is, capacity to act); and thirdly, to enforce rights and duties in a lawsuit (that is, capacity to litigate or *locus standi in iudicio*). A fourth capacity, namely the capacity to be held accountable for crimes and delicts, has been added. These capacities will now be discussed in more detail.

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1 Fockema Andreae *Rechtsgeleerd Handwoordenboek sv* "status" defines status as the "[t]oestand, hoedanigheid waaraan bepaalde rechtsgevolgen verbonden zijn" (i.e., condition, quality to which certain legal consequences are attached).

2 WA Joubert 119. On the distinction between *kompetensies* and *bevoegdhede*, see further Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 67 fn 10, 69 fn 14. On the distinction between law in the objective sense (law) and law in the subjective sense (rights), see ch 1 above.

3.2 Legal capacity

Legal capacity (*regsbevoegdheid*) is the capacity to have rights and duties.[3] All human beings have this capacity irrespective of their personal qualities. Thus a newborn baby, a mentally ill person and an insolvent person all have legal capacity.

A clear distinction must be drawn between the capacity to have rights and duties, and the particular rights and duties that a specific person has at a specific time. There is no difference in the status of two persons merely because one has a large estate and consequently has more rights than the other. There will be a difference in their status only if the one can have rights that the other cannot. Children below the age of seven (that is, *infantes*), for example, cannot marry and therefore cannot have the rights that arise from a marriage. They have limited legal capacity and thus not only their legal capacity, but also their status differs from that of persons who may marry.

Therefore, although all legal subjects have legal capacity, their legal capacity does not extend equally far. Certain legal subjects cannot have certain rights or duties at all, or cannot have certain rights or duties at a specific moment. This means that the legal capacity of those legal subjects is limited to some extent because there are certain rights that they cannot have. It does not, however, mean that they have no legal capacity whatsoever. They are still capable of having rights and duties although their legal capacity is limited in so far as they cannot have *certain* rights and duties. No legal subject can be entirely without legal capacity. It is precisely this fact that characterises a legal subject. Something that can never have rights and duties is not a legal subject but may be a legal object.[4]

3.3 Capacity to act

Capacity to act (*handelingsbevoegdheid*) refers to the capacity to perform valid juristic acts.[5] A juristic act is a human act to which the law attaches at least some of the consequences desired by the party or parties performing the act. A valid juristic act can therefore be brought about only if the law attaches consequences to a person's declaration of intent.

It is clear that entering into legal transactions can have serious implications for the persons concerned and therefore a person must have achieved a certain level of intellectual development before the law confers capacity to act on him or her. Children below the age of seven years and mentally ill persons, for example, have no capacity to act in South African law. This does not mean that, legally speaking, these people have no will or cannot give expression to it. It simply means that the law, for their own protection, does not attach any validity to their expression of will.

In certain cases the law attaches consequences to some expressions of will by certain persons while no consequences are attached to other expressions of will by the same persons. Such people, for example, minors between the ages of seven and 18 years, have limited capacity to act. The considerations underlying the limitations on their capacity to act may vary. People below 18 years of age, for example, are considered not to have the necessary maturity of judgement and must therefore be protected by the law.

3 Some authors call this "passive legal capacity": see e.g. Barratt in Barratt (ed.) *Persons and the Family* 11; *Boberg's Law of Persons and the Family* 66, 74; *Wille's Principles* 146; see also Schäfer *Child Law* 199, who refers to passive capacity to acquire rights and duties.

4 On the distinction between a legal subject and a legal object, see ch 1 above.

5 Some authors call this "capacity to perform juristic acts" or "active legal capacity": see e.g. Barratt in Barratt (ed.) *Persons and the Family* 11; *Boberg's Law of Persons and the Family* 66, 73–74; *Wille's Principles* 146.

3.4 Capacity to litigate

Capacity to litigate (that is, *locus standi in iudicio* or *verskyningsbevoegdheid*) is the capacity to appear in court as a party to a lawsuit. There usually is a close correlation between capacity to act and capacity to litigate.

Some authors[6] maintain that everyone has all three of the above-mentioned capacities. They argue that even *infantes* and mentally ill persons have capacity to act and litigate although they do not have capacity to act or litigate on their own behalf. Though they cannot perform certain juristic acts at all (for example, marrying or executing a will), there are other acts that can be performed on their behalf (for example, entering into an ordinary commercial contract). In the case of the latter acts, the *infantes* and mentally ill persons themselves perform the acts because their guardians or curators merely act as their functionaries. What these people actually lack is not capacity to act or *handelingsbevoegdheid* but *selfhandelingsbevoegdheid*, that is, the capacity to perform the act personally. A similar argument is advanced regarding capacity to litigate; in other words, the person lacks the capacity to litigate personally (*selfverskyningsbevoegdheid*), but does not altogether lack capacity to litigate.[7] It is submitted that this approach should not be followed.[8]

3.5 Capacity to be held accountable for crimes and delicts

The three capacities discussed above do not include a person's capacity to be held accountable for crimes and delicts (that is, wrongdoings) he or she commits. A fourth capacity should therefore be added to the traditional ones, namely accountability, or the capacity to be held accountable for crimes and delicts.[9] This capacity is to a large extent influenced by a person's age and mental condition because fault in the form of either intent or negligence is, generally speaking, a requirement for criminal and delictual liability. Consequently, if someone cannot have fault, for example, because he or she is too young or is mentally ill, he or she cannot be held accountable for his or her delicts and crimes. Accountability often coincides with capacity to act and capacity to litigate.

To summarise, one can say that a person's status is the aggregate of his or her capacities, and also determines his or her capacities (that is, his or her legal capacity, capacity to act, capacity to litigate, and capacity to be held accountable for crimes and delicts). A person's status, in turn, is dependent upon all his or her attributes or the condition in which the person finds himself or herself and to which the law attaches consequences.

No one can change the capacities arising from his or her status on his or her own. A person may, however, change his or her status in certain respects, for example, by changing his or her domicile.

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6 Van der Vyver and Joubert 54–55; Van Zyl and Van der Vyver 378–381; Van der Vyver 1973 *THRHR* 271–272, 1979 *THRHR* 129.

7 Van der Vyver and Joubert 54–55; Van der Vyver 1973 *THRHR* 271–272, 1979 *THRHR* 129. Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 14, 15 approve of the terms *selfhandelingsonbevoeg* and *selfverskyningsonbevoeg*. They translate these terms as "personal capacity to act" and "personal capacity to litigate".

8 Van Rensburg's criticism of the approach (1974 *THRHR* 94 *et seq*) is correct. See also Cronjé *LAWSA* vol 20 part 1 *Persons* par 449 fn 16; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 72–73; Heaton and Pretorius 2007 *SALJ* 120.

9 See e.g. Barratt in Barratt (ed.) *Persons and the Family* 10, 12; Van der Vyver and Joubert 7; Van der Vyver in Strauss (ed.) *Huldigingsbundel vir WA Joubert* 201, 210; *Wille's Principles* 146. But see Van Zyl and Van der Vyver 381 who do not consider *toerekeningsvatbaarheid* to be a capacity.

4

DOMICILE

4.1 Introduction

As legal systems differ, it is of the utmost importance to establish which legal system determines a person's status. In many legal systems a person's private-law status is determined by the law of the country of which he or she is a citizen (that is, the person's nationality).[1] In South African law, however, a person's status is generally determined by the law of the place where the person is domiciled (that is, the person's *lex loci domicilii*, *lex domicilii* or domiciliary law).[2]

Thus, for example, a person's *lex domicilii* determines whether he or she is a minor.[3] The question of whether a child was born of married or unmarried parents is determined by the law of the place where the child was domiciled at birth (that is, the child's domicile of origin).[4] A person's *lex domicilii* is also important in the law of succession. For instance, the law of intestate succession of the country in which the deceased was domiciled at the time of his or her death determines how his or her movable property devolves if he or she died without having made a valid will (that is, if he or she died intestate).[5] The *lex domicilii* of the testator at the time of executing a will determines whether he or she has the capacity to dispose of his or her movable property by means of that will.[6] Domicile also plays a role in respect of jurisdiction. For instance, matters regarding a person's status must, as a rule, be heard by the court having jurisdiction in the area where the person is domiciled.[7] Domicile is also a factor in determining whether a foreign judgment can be enforced against a person in a local jurisdiction.[8]

The *lex domicilii* also plays an important role in respect of the patrimonial consequences of a marriage, because the *lex domicilii* of the husband at the time of the marriage determines the spouses' matrimonial property system.[9] Take the example of a man domiciled in South Africa who marries a German woman, in Germany, while studying there. The patrimonial consequences of the marriage are determined by South African law. This means

1 Citizenship is very important as far as a person's status at public law is concerned but because it does not play a major role in private law it is not discussed in this book.

2 See e.g. Boezaart *Persons* 32; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 210; *Wille's Principles* 153; Schoeman 1999 *THRHR* 272.

3 See e.g. Barratt in Barratt (ed.) *Persons and the Family* 118; Boezaart *Persons* 35; Forsyth 313; Kruger and Skelton (eds) *Persons* 68–69.

4 *Seedat's Executors v The Master (Natal)* 1917 AD 302.

5 *Estate Baker v Estate Baker* (1908) 25 SC 234.

6 See e.g. Barratt in Barratt (ed.) *Persons and the Family* 119; Boezaart *Persons* 36; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 214–215; Forsyth 401–402; Kruger and Skelton (eds) *Persons* 71.

7 See e.g. *Ex parte Kaiser* 1902 TH 165; *Ex parte Oxton* 1948 (1) SA 1011 (C). For an exception to the rule, see s 2(1)(*b*) of the Divorce Act 70 of 1979.

8 See e.g. Divorce Act s 13.

9 *Frankel's Estate v The Master* 1950 (1) SA 220 (A). On the various matrimonial property systems, see Heaton and Kruger *Family Law* chs 6 and 7.

that the marriage is in community of property unless the parties concluded an antenuptial contract.[10] The rule regarding the husband's *lex domicilii* as the determining factor in respect of the matrimonial property system applies to heterosexual civil unions, too.[11] However, it fails to cater for same-sex civil union partners: in such unions there is no "husband" whose *lex domicilii* can be used, because the parties to the civil union are either two males (two husbands) or two females (two wives).[12] This failure unjustifiably limits the right to equality that is protected by section 9 of the Constitution. It, *inter alia*, unfairly discriminates against same-sex civil union partners on the ground of their sexual orientation by leaving the proprietary consequences of their civil union uncertain.[13] Even in the case of heterosexual spouses and heterosexual civil union partners the rule unjustifiably limits the equality clause, for it constitutes unjustifiable unfair discrimination on the ground of sex.[14] Therefore, the rule should be declared unconstitutional. Unfortunately, South African private international law does not currently have a ready replacement for the rule.[15] It is submitted that the legislature should step in as a matter of urgency to enact a suitable and constitutionally acceptable rule.[16]

4.2 Replacement of the common-law rules on domicile by the Domicile Act 3 of 1992

In the past, the law of domicile was governed by the common law, and uncertainty prevailed on many aspects relating to domicile. For this reason, the South African Law Commission (which is now called the South African Law Reform Commission) investigated domicile with a view to reforming this branch of the law.[17] Its investigation and recommendations culminated in the Domicile Act 3 of 1992, which came into operation on 1 August 1992.

The Act solved many, but not all, of the problems with regard to the law of domicile. For example, it remains unclear whether someone can have more than one domicile at the same time. It is also unclear whether military staff, diplomats, public servants, employees of foreign governments or businesses, and prisoners are competent to establish a domicile of choice in terms of the Act or whether the common law still applies to them. These issues are discussed below in the chapter.

It should also be noted that the Act is not retrospective. It accordingly does not affect any right, capacity, obligation or liability which was acquired, accrued or incurred by virtue of the domicile a person had at any time prior to 1 August 1992. Nor does it affect the legality of any act performed before that date.[18] For example, in *Lenferna v Lenferna*,[19] which was decided in 2013, the issue of whether the husband had a domicile in South Africa at the time of the spouses' marriage had to be determined in terms of the common law, because the marriage was solemnised in 1983.

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10 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

11 Civil Union Act 17 of 2006 s 13(2).

12 See also Farlam JA's minority judgment in *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA), 2005 (3) SA 429 (SCA) pars [124]–[125] and *AS v CS* 2011 (2) SA 360 (WCC) par [55].

13 S 9(3) and (4) of the Constitution deals with unfair discrimination.

14 For criticism of the rule, especially in the light of the equality clause in the Constitution, see Forsyth 296, 300–301; Kruger and Skelton (eds) *Persons* 70; Neels 1992 *TSAR* 336; Heaton and Schoeman 2000 *THRHR* 146; Schoeman 2004 *TSAR* 117–118, 140; Neels and Wethmar-Lemmer 2008 *TSAR* 587–588.

15 On alternative rules which might be used, see Forsyth 302–303; Stoll and Visser 1989 *De Jure* 335; Schoeman 2004 *TSAR* 132–140; Neels and Wethmar-Lemmer 2008 *TSAR* 587.

16 See also Boezaart *Persons* 35; Forsyth 303; Schoeman 2004 *TSAR* 140.

17 *Project 60 Domicile.*

18 S 8(2).

19 Unreported, SCA case no 120/13, 2 December 2013.

4.3 Definition of domicile

A person's domicile is the place where he or she is legally deemed to be constantly present for the purpose of exercising his or her rights and fulfilling his or her obligations, even in the event of his or her factual absence.

Although a person's domicile frequently coincides with the place where he or she permanently resides, permanent residence is not the same as domicile. Thus the fact that somebody is permanently resident in South Africa does not necessarily mean that he or she has a domicile here.

4.4 General principles governing domicile

Every person must have a domicile at all times.[20] In other words, no one can ever be without a domicile.

Whether someone can have more than one domicile at the same time has not been finally settled in our law. For example, can a person who lives in Pretoria for six months of the year and in London for the other six months have two domiciles? According to our common-law authors the answer would be "yes".[21] However, *obiter dicta* in some of the decisions of our courts indicate that a person cannot have more than one domicile at a particular time.[22] In *Eilon v Eilon*[23] the Appellate Division (now the Supreme Court of Appeal) referred to the issue but did not have to decide it. The Law Commission did not deal with this matter in its *Report on Domicile*. Because the Domicile Act was based on the recommendations contained in the Law Commission's report, it too is silent in this regard. Most modern South African authors, however, submit that a person cannot have more than one domicile at the same time.[24]

In terms of section 3(1) of the Domicile Act, no one loses his or her domicile until he or she has acquired another domicile. A change of domicile is never simply accepted. It must always be proved.[25] Whether a person has acquired or lost a domicile is determined on a balance of probabilities.[26]

4.5 Kinds of domicile

Our law distinguishes between the following kinds of domicile:

4.5.1 Domicile of origin

A person's domicile of origin (also called the person's original domicile or *domicilium originis*) is the domicile the law confers on the person at birth. In the past, a person's domicile of origin revived if he or she abandoned his or her domicile of choice without assuming a new domicile. In such event the person's status was determined by the law of his or her domicile of origin until such time as he or she assumed a new domicile of

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20 Boezaart *Persons* 33; Clark in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 104; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 205; Forsyth 132–133; Van der Vyver and Joubert 84; *Wille's Principles* 152.

21 Voet 5.1.92; Van Leeuwen *Rooms-Hollands-Regt* 5.6.1; Van Bijnkershoek II 1371; Van der Keessel *Praelectiones* 1.2.27.

22 *Leviny v Leviny* (1908) 25 SC 173; *Ex parte Donelly* 1915 WLD 29; *Webber v Webber* 1915 AD 239; *Sukovs v Van der Walt* [1998] 3 All SA 664 (O).

23 1965 (1) SA 703 (A), Heaton *Casebook on the Law of Persons* case [13].

24 Boezaart *Persons* 33; Clark in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 104; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 205; Forsyth 133; Kahn 14–17; Van der Vyver and Joubert 84; *Wille's Principles* 152. But cf Spiro 1962 *Acta Juridica* 66–69.

25 *Mason v Mason* (1885) 4 EDC 330; *Smith v Smith* 1952 (4) SA 750 (O).

26 S 5.

choice.[27] Thus the person's domicile was neither based on the place where he or she physically resided nor was it connected with his or her intention – it was simply a domicile that was assigned to him or her by operation of law for reasons of efficacy.

The Domicile Act changed the position. Section 3(1) of the Act provides that no one loses his or her domicile until he or she has acquired another domicile, whether by choice or operation of law. Section 3(2) of the Act expressly provides that a person's domicile of origin does not revive, although a person can have a domicile where his or her domicile of origin was if he or she acquires a domicile of choice there[28] or if he or she does not have the capacity to acquire a domicile of choice and the law assigns a domicile to him or her[29] at the place where his or her domicile of origin was, because he or she is most closely connected with that place. Thus, for example, a child who is born in South Africa and lives with his or her parents in this country acquires a domicile here. If the child moved permanently with his or her parents to Egypt, he or she would acquire an assigned domicile in Egypt. If, as an adult, he or she left Egypt with the intention of never returning to that country and lawfully returned to South Africa with the intention of indefinitely living here, he or she would once again obtain a South African domicile. However, his or her South African domicile would be a domicile of choice; it would not be his or her domicile of origin that revived.

Because of the provisions of the Domicile Act, domicile of origin has lost most of its significance. A person's domicile of origin is still relevant in so far as it determines whether the person qualifies as a child born of married parents.[30] As a person's domicile of origin is purely the first domicile assigned to him or her, it might just as well be categorised simply as an example of an assigned domicile (that is, a domicile by operation of law).[31]

4.5.2 Domicile of choice

(a) Definition

A domicile of choice is the domicile that a person who has capacity to act has chosen for himself or herself by exercise of his or her free will.

(b) Persons who can acquire a domicile of choice

Section 1(1) of the Domicile Act provides that, regardless of sex or marital status, everyone who is of or over the age of 18 years and everyone under the age of 18 years who legally has the status of a major, is competent to acquire a domicile of choice, unless he or she lacks the mental capacity to make a rational choice. Therefore the only persons who can acquire a domicile of choice are adults (that is, persons who are 18 years or older)[32] and minors (that is, persons below the age of 18 years)[33] who have acquired majority status. A minor can acquire majority status by entering into a marriage.[34] As minors are expressly excluded from concluding civil unions, they cannot acquire majority status by concluding a civil union.[35]

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27 *Ex parte Donelly* 1915 WLD 29; *Hutchison's Executor v The Master (Natal)* 1919 AD 71; *Grindal v Grindal* 1997 (4) SA 137 (C), Heaton *Casebook on the Law of Persons* case **[10]**; Kahn 19 *et seq.*

28 In terms of s 1 of the Act. See also *Grindal v Grindal* 1997 (4) SA 137 (C).

29 In terms of s 2 of the Act.

30 But see Forsyth 154 and 312, who indicates that difficulties may arise if the *lex domicilii* of the parents differ.

31 Davel 1993 *De Jure* 405.

32 Children's Act 38 of 2005 s 17.

33 *Ibid.*

34 On a minor's capacity to marry, see ch 5 below. As an emancipated minor does not acquire majority status, he or she cannot acquire a domicile of choice. On the age of majority and the ways of terminating minority, see ch 6 below.

35 Civil Union Act s 1. On a minor's inability to enter into a civil union, see further ch 6 below.

The second requirement set out in section 1(1) is that the person must have the mental capacity to make a rational choice. Consequently, a mentally ill person or a person with a serious intellectual disability cannot acquire a domicile of choice.[36]

Fortunately, sex and marital status no longer plays a role in the acquisition of a domicile of choice. At common law a wife automatically acquired her husband's domicile at marriage and followed it whenever he changed it, irrespective of whether she was present at the particular place or whether she had the intention of residing there permanently.[37] This rule applied even if the spouses were living in different countries. The wife's domicile was called a domicile of dependence.

A minor also had a domicile of dependence, which was the domicile of his or her guardian. Now, as is explained below in this chapter, a minor has an assigned domicile which does not necessarily correspond to his or her guardian's domicile.

(c) Presence and intention as requirements for acquiring a domicile of choice

Section 1(2) of the Act provides that a domicile of choice is "acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period". The section thus sets two requirements: one relates to being lawfully present at a particular place, and the other relates to the person's intention about the duration of settling at the particular place. At common law these requirements were respectively called the *factum* and the *animus* requirement.

The two requirements must at some time or another exist simultaneously but they need not come into being simultaneously.[38] A person may therefore first settle at a place and only later form the intention of residing there indefinitely.

Once a domicile of choice has been established at a particular place, the person does not have to be continuously present at that place in order to retain the domicile.[39]

Let us consider the two requirements in section 1(2) in more detail:

(i) *Lawful presence*

To comply with the first requirement in section 1(2), the person must actually settle at the particular place where he or she wants to acquire a domicile of choice, and his or her presence there must be lawful. It is important to note that the section only recognises lawful presence for purposes of acquiring a domicile of choice.[40] An illegal alien (also called a prohibited immigrant) can therefore not acquire a domicile of choice in South Africa despite having the intention of settling here permanently.[41] However, in *Van Rensburg v Ballinger*[42] the court held that a prohibited immigrant whom the authorities had openly permitted to reside in South Africa could acquire a domicile of choice here.

A person who has applied for refugee status in South Africa is not in the same position as an illegal alien.[43] While the person's application for refugee status is being considered by the South African authorities, he or she is lawfully present in the country.[44] Therefore, he or she can meet the requirement of lawful presence for purposes of acquiring a domicile of choice.

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36 On mental illness and intellectual disabilities as factors influencing status, see chs 7 and 8 below.

37 Surprisingly, some courts seem to be unaware of the fact that a wife no longer follows her husband's domicile. In *Central Authority v TK* 2015 (5) SA 408 (GJ), Spilg J incorrectly stated that a wife and a minor obtain domiciles of dependence.

38 *Grindal v Grindal* 1997 (4) SA 137 (C).

39 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).

40 But see *Toumbis v Antoniou* 1999 (1) SA 636 (W) where Cloete J, in an *obiter dictum*, adopted the incorrect view that a person can have a domicile of choice at a place where his or her presence has been rendered unlawful because the authorities have decided that he or she must be removed from that place.

41 *Smith v Smith* 1962 (3) SA 930 (FC), Heaton *Casebook on the Law of Persons* case **[12]**.

42 1950 (4) SA 427 (T).

43 *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA).

44 *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP).

Persons who are deported from South Africa lose their domicile in this country even if they intend returning, because their return would be unlawful.[45]

It has been held that a person who has acquired a domicile at a particular place and who subsequently leaves that place in order to escape from the process of the law (in other words, someone who becomes a fugitive from justice) does not lose his or her domicile at the place from which he or she has fled.[46] The object of this rule is to preclude the fugitive from relying on the court's not having jurisdiction to hear the matter, thereby escaping the consequences of his or her misconduct. It must be borne in mind that in this instance the fugitive's residence has not been rendered unlawful; he or she has fled in order to escape the legal consequences of his or her actions. This case therefore differs from that of the illegal alien.

In order to establish whether a person meets the requirement regarding physical presence the situation is viewed objectively.[47] A specific period of physical presence is not required, but the person must not simply be visiting the place where he or she wants to acquire a domicile of choice.[48] If it is established that the person was indeed physically present at a specific place where he or she intended to stay, and that his or her residence was lawful, the duration of his or her residence there is irrelevant. However, the courts sometimes take the duration of the physical presence into consideration to infer whether the person had the intention of remaining at that specific place (that is, whether the person had the *animus manendi*).[49]

(ii) *Intention to settle for an indefinite period*

The second requirement in section 1(2) provides that a person can acquire a domicile of choice at a particular place if he or she has the intention of settling there "for an indefinite period".[50] Thus a person can satisfy this requirement even if he or she envisages moving at an unknown future time.[51]

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45 *Ex parte Macleod* 1946 CPD 312; *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N).

46 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C). Chetty J simply cited the Rhodesian (i.e. Zimbabwean) case of *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (4) SA 564 (RA) and Kahn's discussion in 1973 *Annual Survey* 436–437 as authority for this view. It is doubtful whether *Steinberg*'s case was correctly decided (see Forsyth 421 fn 27 and 436–437; Forsyth considers the decision to be so wrong on so many points that "it would be foolhardy to rely upon it for any proposition!"). The correctness of this point of the decision in *Chinatex Oriental Trading Co v Erskine* may therefore also be suspect. The judgment in *Chinatex Oriental Trading Co v Erskine* was reversed in *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) on the ground that it was not proved that the appellant had ever obtained a domicile in England, as the court *a quo* had found. The appeal court therefore found it unnecessary to deal with the court *a quo*'s finding that the appellant had not lost his domicile in England because he had fled that country as a fugitive from justice.

47 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).

48 *Ibid.*

49 *Cook v Cook* 1939 CPD 314, Heaton *Casebook on the Law of Persons* case **[11]**; *Smith v Smith* 1952 (4) SA 750 (O); *Webber v Webber* 1915 AD 239; *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C); *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C).

50 Despite the enactment of the Domicile Act, Wright J in *Sukovs v Van der Walt* [1998] 3 All SA 664 (O) based his decision on the strict common-law test for *animus*, namely that the person must have a fixed and deliberate intention to abandon his or her previous domicile and to settle permanently at his or her new place of residence, without entertaining any doubt as to whether or not he or she would remain there, and without contemplating any certain or foreseeable future event which would cause him or her to leave (see *Eilon v Eilon* 1965 (1) SA 703 (A)). Although *Sukovs* does not contain a single reference to the Domicile Act and it is abundantly clear from the judgment that Wright J was unaware of the Act, his conclusion that the respondent had acquired a domicile of choice in New Zealand would have been no different had he applied the provisions of the Act.

51 For a detailed analysis of when a person can be said to have intended to settle for an "indefinite" period as envisaged by the Domicile Act, see Schoeman 1999 *THRHR* 272, 325, especially 329–334.

To establish whether the person complies with the requirement a subjective test is used.[52] In other words, the intention of the particular person is determined.

To satisfy the requirement, the person must be able to carry out his or her intention of settling at the particular place.[53] The fact that a person who has applied for refugee status has precarious residence because the application might be dismissed does not disqualify the person from acquiring a domicile of choice, but it is a factor that is taken into account in determining whether he or she can have the intention to settle for an indefinite period.[54]

Military staff, diplomats, public servants, employees of foreign governments or businesses, and prisoners were initially considered incapable of acquiring a domicile of choice at the place where they were stationed, posted or imprisoned, on the ground that their employers or the state determine where they are to reside and that they therefore cannot give effect to their intention of settling at a particular place. The Domicile Act does not expressly deal with the acquisition of a domicile of choice by someone who is not free to decide where he or she wants to reside. No provision expressly excludes a person whose presence at a particular place is not originally by choice, from acquiring a domicile of choice there. It could therefore be argued that, like any other person over the age of 18 years who has the required mental capacity, such a person should be competent to establish a domicile of choice in terms of section 1 of the Act.[55] Consequently, the mere fact that someone has been posted to, or is stationed or imprisoned at, a specific place should not render him or her incapable of having the required intention to acquire a domicile of choice. I prefer this view.[56]

In contrast, it could be argued that because the Act does not expressly state that people like military staff, diplomats, public servants, employees and officers of foreign governments or businesses, and prisoners can meet the requirement regarding intention even though their employment or imprisonment limits their ability to give effect to their intention, the common law still applies in this respect.

As it is unclear which argument will be preferred by the courts, the common-law position is briefly summarised below:

Military staff

It used to be generally accepted that foreign military staff could not acquire a domicile of choice in South Africa, however much they wished to settle here permanently. In *McMillan v McMillan*[57] the reason given for this attitude was that the person's residence here was not voluntary but was prescribed by a foreign power. In 1945 the Appellate Division in *Baker v Baker*[58] opened the door to a new approach. It held that soldiers can acquire a domicile of choice at a place where they are *not* stationed. Although the court declined to answer the question of whether soldiers can acquire a domicile of choice where they *are* stationed, the erstwhile Transvaal[59] and Cape courts[60] subsequently interpreted *obiter dicta* in the judgment as being authority for the view that this is possible.

Diplomats, public servants, and employees and officers of foreign governments or businesses

Originally, foreign diplomats, police officials, public servants, and employees and officers of foreign businesses were also denied a domicile of choice in South Africa while they were in

52 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).
53 *Ex parte Quintrell* 1922 TPD 14.
54 *Toumbis v Antoniou* 1999 (1) SA 636 (W); *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP).
55 Boezaart *Persons* 45, 46–47; Forsyth 146; South African Law Commission *Report on Domicile* par 3.76; Davel 1993 *De Jure* 403. See also Forsyth 147, 149; Kahn 53.
56 See also Kruger and Skelton (eds) *Persons* 76.
57 1943 TPD 345.
58 1945 AD 708.
59 *Moore v Moore* 1945 TPD 407; *Ex parte Glass et Uxor* 1948 (4) SA 379 (W).
60 *Nicol v Nicol* 1948 (2) SA 613 (C); *Ex parte Readings* 1958 (4) SA 432 (C).

the service of the foreign government or business.[61] In *Naville v Naville*[62] the Cape court decided, however, that a foreign diplomat could acquire a domicile of choice in South Africa while still in the service of a foreign country. The same should apply in respect of public servants and employees and officers of foreign governments and businesses.

Prisoners

It has been argued that a prisoner cannot acquire a domicile of choice at the place where he or she is imprisoned since he or she is not there of his or her own free will.[63] In *Nefler v Nefler*[64] it was, however, held that a prisoner who had been imprisoned for life automatically acquired a domicile of choice in prison.

4.5.3 Assigned domicile (domicile by operation of the law, domicile of closest connection)

Section 2(1) of the Domicile Act provides that anyone who does not have the capacity to acquire a domicile of choice is domiciled at the place with which he or she is most closely connected. Minors and people who do not have the mental capacity to make a rational choice cannot acquire a domicile of choice.[65] The law assigns a domicile to them for as long as their minority or mental incapacity lasts, and that domicile is the place with which the particular person is most closely connected. This type of domicile is called an assigned domicile, a domicile by operation of the law, or the domicile of closest connection.

(a) Domicile of a minor

By virtue of the provisions of section 2 of the Domicile Act a minor is domiciled at the place with which he or she is most closely connected. Section 2(2) contains the rebuttable presumption that if a minor normally has his or her home with one or both of his or her parents, the parental home is the minor's domicile. Section 2(3) of the Act expressly provides that the term "parents" includes a child's adoptive parents and parents who are not married to each other.

A domicile is assigned to a minor only if he or she is unmarried.[66] When the minor attains majority or if he or she acquires the status of a major by getting married, he or she retains the domicile he or she had by operation of law until he or she establishes a domicile of choice.[67]

(b) Domicile of a mentally incapacitated person

Formerly, the courts adopted the view that mentally incapacitated persons retained the domicile they had when they became mentally incapacitated.[68] In contrast, some authors were of the opinion that it would be better if mentally incapacitated persons followed the domicile of their curator, if one had been appointed.[69] The issue has been resolved by the Domicile Act, which provides that persons who do not "have the mental capacity to make a rational choice" cannot acquire a domicile of choice.[70] Instead, they acquire a domicile at the place with which they are most closely connected.[71]

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61 *Bothma v Bothma* 1940 (1) PH B9 (O); *Carvalho v Carvalho* 1936 SR 219.

62 1957 (1) SA 280 (C), Heaton *Casebook on the Law of Persons* case [**14**]. See also the *obiter dicta* in *Ex parte Quintrell* 1922 TPD 14 16; *Fozard v Fozard* 1923 CPD 62 63 and *McMillan v McMillan* 1943 TPD 345 349–350 which suggest that they can acquire a domicile of choice since such employees are normally not transferred as often as soldiers.

63 Kahn 53.

64 1906 ORC 7.

65 Ss 1(1) and 2.

66 Above in this chapter it is explained that marriage is the only means by which a minor can acquire majority status.

67 S 3(1).

68 *Henning's Executor v The Master* (1885) 3 SC 235; *Rifkin v Rifkin* 1936 WLD 69.

69 Boberg 68; Kahn 98–99; Van der Vyver and Joubert 100.

70 S 1(1).

71 S 2(1).

5

CHILDREN BORN OF UNMARRIED PARENTS

5.1 Introduction

In the past, our law categorised children as either "legitimate" or "illegitimate" (children born out of wedlock, extra-marital children). The Children's Act 38 of 2005 steers away from these negative, hurtful terms. Instead, it labels parents with reference to their marital status and uses that criterion to regulate the acquisition of parental responsibilities and rights. Thus the Act refers to a married or an unmarried father, a married or an unmarried mother, a married or an unmarried person, and married parents.[1] Consequently, the terms "child born of married parents" and "child born of unmarried parents" are the more up-to-date descriptions for children, and they are used in this book.

Originally, "illegitimate" children suffered from a number of legal disabilities, and the rules relating to their parents' responsibilities and rights differed markedly from those that applied to the responsibilities and rights of parents of "legitimate" children. Gradually, the law began to reduce these legal differences. As appears from the discussion below in this chapter, the law still does not treat unmarried and married parents in exactly the same way. Now, however, the law grants the same parental responsibilities and rights to certain unmarried fathers that it grants to married parents and unmarried mothers.

5.2 Definition of "children born of married parents" and "children born of unmarried parents"

A child born of married parents is a child who is born of parents who are legally married to each other at the time of the child's conception or birth or at any intervening time.[2] The Children's Act defines marriage in broad terms that include civil, customary and religious marriages.[3] In terms of the Civil Union Act 17 of 2006,[4] civil unions are also covered by the term "marriage". Thus a child who is born of civil union partners is also a child born of married parents.

If a child's parents are not the parties to a marriage or civil union with each other at the time of the child's conception or birth or at any intervening time, the child is a child born of unmarried parents.

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1 See e.g. ss 19–21, 38, 40 and 233.

2 Children's Act s 20; Grotius 1.12.2, 1.12.3; Van der Keessel *Theses Selectae* 169; Van Leeuwen *Rooms-Hollands-Regt* 1.7.2; Voet 1.6.6. This rule extends to a child born of a voidable marriage: Children's Act s 39(1) and (6). A child who is born of a putative marriage is also treated as a child born of married parents, even though the marriage is void: *M v M* 1962 (2) SA 114 (GW). On putative marriages, see Heaton and Kruger *Family Law* ch 4.

3 S 1(1).

4 S 13(2).

5.3 Categories of children born of unmarried parents

5.3.1 Introduction

Traditionally, three different categories of children born of unmarried parents were distinguished. The differences between these categories are of little importance in modern law. Their only relevance is that an incestuous child will usually not be able to acquire the status of a child born of married parents by way of his or her parents' subsequent marriage or civil union, because the child's parents will usually not be able to enter into a marriage or civil union with each other.

5.3.2 Natural children

Natural children are born of parents who, though not married to each other at the time of the child's conception or birth or at any intervening time, could validly have married each other. The same applies if the child's parents were not civil union partners at the time of the child's conception or birth or at any intervening time, but could have entered into a valid civil union with each other.

5.3.3 Adulterine children

In the case of an adulterine child one or both of the child's parents were married to someone else or were parties to a civil union with somebody else at the time of the child's conception.

5.3.4 Incestuous children

Incestuous children are born of parents who could not have married each other or could not have entered into a civil union with each other at the time of the child's conception because they were too closely related.

5.4 Artificial fertilisation

5.4.1 Meaning of "artificial fertilisation"

Artificial fertilisation refers to the introduction, by artificial means (in other words, not by way of sexual intercourse), of a male gamete into the internal reproductive organs of a woman for the purpose of human reproduction. (A gamete is "either of the two generative cells essential for human reproduction", that is, a sperm and an ovum.)[5] Artificial fertilisation also includes the joining of a male and female gamete outside the human body with a view to placing the product in a woman's womb as well as the actual placing of such product in a woman's womb (that is, *in vitro* fertilisation).[6]

The definition of artificial fertilisation is wide enough to cover surrogate motherhood (surrogacy). Surrogate motherhood refers to the situation where the surrogate mother undertakes to be artificially fertilised for the purpose of bearing a child for the commissioning parent(s) and handing that child over to the commissioning parent(s) upon the child's birth or within a reasonable time thereafter so that the child will become the commissioning parent(s)' child as if he or she were born of the commissioning parent(s).[7] A commissioning parent is the person who enters into a surrogate motherhood agreement with the

5 Children's Act s 1(1). The harvesting and donation of sperm and ova for purposes of artificial fertilisation are governed by ss 55, 56 and 60 of the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilisation of Persons published in GN R175 *GG* 35099 of 2 March 2012.

6 Children's Act s 1(1).

7 The Children's Act does not define "surrogate motherhood". It does, however, define "commissioning parent", "surrogate mother" and "surrogate motherhood agreement": s 1(1). From these definitions one can deduce the definition of surrogate motherhood that appears in the text above.

surrogate mother with the objective that the surrogate mother will be artificially fertilised and will bear a child for him or her.[8]

Nowadays artificial fertilisation is often called assisted fertilisation or assisted reproduction.

5.4.2 Status of a child who is born as a result of artificial fertilisation

If a child is born as a result of the artificial fertilisation of a woman who is not a party to a marriage or a civil union, he or she is a child born of unmarried parents. If the woman is married or a party to a civil union and the semen of her husband or civil union partner was used for the artificial fertilisation, the child is a child born of married parents. This is the position regardless of whether or not the woman's husband or civil union partner consented to his semen being used.[9] If donor sperm and/or a donated ovum was used for the artificial fertilisation of a woman who is married or a party to a civil union, the child is a child born of married parents only if both spouses or civil union partners consented to the artificial fertilisation.[10] Because consent is presumed to have been given,[11] anyone who alleges that it was absent bears the *onus* of proof.

Prior to the coming into operation of section 40 of the Children's Act, the decision of the Constitutional Court in *J v Director General, Department of Home Affairs*[12] placed a child who was born as a result of the artificial fertilisation of a same-sex life partner in the same position as a child born as a result of the artificial fertilisation of a married woman. However, as explained in chapter 2 above, section 40 of the Children's Act subsequently re-enacted the law as it was before *J* was decided. Consequently, a child who is born to same-sex life partners who fall outside the ambit of the Civil Union Act as a result of the artificial fertilisation of one of them now is a child born of unmarried parents.

5.4.3 Relationship between the child and the birth mother, and between the child and the person whose gamete was used for the artificial fertilisation

(a) Artificial fertilisation without surrogate motherhood

The woman who gives birth to a child who was conceived as a result of artificial fertilisation is for all purposes regarded as the child's mother, unless she is the child's surrogate mother in terms of a valid surrogate motherhood agreement.[13] This rule applies regardless of whether the birth mother is married, unmarried, a party to a civil union, or a party to a life partnership that does not qualify as a civil union. The position that applies in the case of surrogate motherhood is discussed under the next heading below. The present discussion focuses on the position in the absence of surrogate motherhood.

The starting point in respect of the relationship between a child who is born as a result of artificial fertilisation and the person whose gamete was used for the artificial fertilisation is that no rights, responsibilities, duties or obligations arise between them or between the child and the person's blood relations.[14] This rule is subject to an exception, namely that it does not apply if the person whose gamete was used is the child's birth mother or her spouse or civil union partner.[15] If the exception applies, the ordinary rules of the law govern

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8 See the definition of "commissioning parent" read with the definition of "surrogate motherhood agreement" in s 1(1) of the Children's Act.

9 *V v R* 1979 (3) SA 1006 (T).

10 Children's Act s 40(1)(*a*) read with s 13(2) of the Civil Union Act 17 of 2006.

11 Children's Act s 40(1)(*b*).

12 2003 (5) BCLR 463 (CC).

13 Children's Act s 40(2) read with s 297(1)(*a*).

14 Children's Act s 40(3).

15 *Ibid.* S 40(3)(*b*) specifically refers to the woman's "husband", but in view of s 13(2) of the Civil Union Act the woman's civil union partner also falls within the ambit of the provision.

the relationship between the child and the person and between the child and the person's blood relations. This means, for example, that if the sperm of the birth mother's husband was used, she and her husband have all the rights, responsibilities, duties and obligations in respect of the child that married parents have in respect of their child. However, if the birth mother is neither married nor a civil union partner, she has all the rights, responsibilities, duties and obligations that a mother has, while the male gamete donor has no rights, responsibilities, duties and obligations unless he qualifies as an unmarried father who has parental responsibilities and rights.[16]

Although the general rule in respect of the relationship between a child who is born as a result of artificial fertilisation and the person whose gamete was used is that no rights, responsibilities, duties or obligations arise between them, section 41(1) of the Children's Act entitles the child or his or her guardian to access to medical information concerning the child's genetic parents.[17] Once the child has turned 18, he or she or his or her guardian may obtain any other information concerning the child's genetic parents.[18] The information may, however, not reveal the identity of the person(s) whose gamete(s) were used for the artificial fertilisation.[19] The Act does not define the term "genetic parents". In its ordinary sense, the term refers to the man and the woman whose genetic contributions (ovum and sperm) merged to form the *foetus* from which the child developed.

(b) Artificial fertilisation of a surrogate mother[20]

(i) *Introduction*

The Children's Act sets requirements for and regulates the consequences of surrogate motherhood. As the present chapter focuses on the status of a child who is born of unmarried parents, the requirements for surrogate motherhood fall outside its scope. Some of the most important requirements are, nevertheless, mentioned below to facilitate a better understanding of legally recognised surrogate motherhood:

(1) Surrogate motherhood may not take place for commercial reasons or be a source of income for the surrogate mother.[21] In other words, only altruistic surrogacy is allowed.

(2) Spouses, civil union partners, same-sex or heterosexual life/permanent partners, or a single person may be commissioning parent(s), provided that they are, or he or she is, permanently and irreversibly unable to give birth.[22]

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16 The ways in which an unmarried father can acquire parental responsibilities and rights are discussed below in this chapter.

17 S 41(1)(*a*). The child "*or* the guardian of such child" may access the information (emphasis added). The word "or" does not mean that if the guardian has obtained the information, the child is not entitled to obtain it, too. Thus, e.g., if a guardian were to refuse to share the information with the child, the child could independently obtain the information. See also Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-50–3-51.

18 S 41(1)(*b*).

19 S 41(2). On the right to know one's biological/genetic origin in the context of artificial fertilisation, see South African Law Reform Commission *The Right to Know One's Biological Origins Issue Paper 32*.

20 On surrogate motherhood and the status of children born as a result of surrogate motherhood, see further Boezaart *Persons* 100–102; Domingo in Barratt (ed.) *Persons and the Family* 217–222; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 12–13; Kruger and Skelton (eds) *Persons* 89–96; Louw in Davel and Skelton (eds) *Commentary on the Children's Act* ch 19; Schäfer *Child Law* ch 10; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 340–353; Mills 2010 *Stell LR* 429; Carnelley and Soni May 2011 *De Rebus* 30; Carnelley 2012 *De Jure* 179; Nöthling-Slabbert 2012 *SAJBL* 27; Louw 2013 *THRHR* 564; Nicholson 2013 *SAJHR* 496; Nicholson and Bauling 2013 *De Jure* 510; Pillay and Zaal 2013 *SALJ* 475; Bonthuys and Broeders 2013 *SALJ* 485; Mahlobogwane 2013 (2) *Speculum Juris* 45; Louw 2014 *De Jure* 110; Metz 2014 *SAJBL* 34; Heaton 2015 *THRHR* 24; Van Niekerk 2015 *PELJ* 398; Jordaan 2016 *SAMJ* 684; Boniface 2017 *TSAR* 190.

21 S 295(*c*)(iv) and (v).

22 S 295(*a*) read with the definition of "commissioning parent" in s 1(1), ss 292(1)(*c*), 293(1) and 294 of the Children's Act, and s 13 of the Civil Union Act.

(3) The parties must conclude and sign a valid surrogate motherhood agreement which must be confirmed by the court.[23]

(4) The surrogate mother may not be artificially fertilised until the agreement has been confirmed.[24]

(5) The gametes of both commissioning parents must be used for the artificial fertilisation of the surrogate mother. If this is not possible due to biological, medical or other valid reasons, the gamete of at least one of them must be used. In other words, surrogate motherhood cannot validly take place unless the child who is to be born has a genetic link to at least one of the commissioning parents. If the commissioning parent is a single person, his or her gamete must be used.[25] In *AB v Minister of Social Development*,[26] the Constitutional Court confirmed that this genetic link requirement does not violate the Constitution of the Republic of South Africa, 1996.[27]

(ii) *Relationship between the child and the birth mother, and between the child and the commissioning parent(s)*

If the parties concluded a valid surrogate motherhood agreement, the surrogate mother must hand the child over to the commissioning parent(s) as soon as is reasonably possible after the child's birth. The child is deemed to be the child of the commissioning parent(s) for all purposes as from the moment of his or her birth.[28]

No rights, responsibilities, duties or obligations arise between the surrogate mother and the child even if her ovum was used for her artificial fertilisation.[29] The surrogate mother, her husband, civil union partner or partner in a permanent relationship and her relations may, however, have contact with the child if the surrogate motherhood agreement permits this.[30]

Furthermore, the child or his or her guardian may have access to medical information concerning the child's genetic parents.[31] Once the child has turned 18, he or she or his or her guardian may also obtain other information concerning the genetic parents,[32] but the information may not reveal the identity of the surrogate mother or the person(s) whose gamete(s) were used for the artificial fertilisation.[33]

If the surrogate motherhood agreement is invalid, the surrogate mother is for all purposes deemed to be the child's mother and the child has no relationship with the commissioning parent(s), regardless of whether either or both of them donated gametes for the surrogate mother's artificial fertilisation.[34]

(iii) *Termination of the surrogate motherhood agreement*

A surrogate mother who is the child's genetic mother (that is, a surrogate mother whose ovum was used for her artificial fertilisation) may terminate a valid surrogate motherhood

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23 S 292(1). S 295 lists the aspects of which the court must be satisfied before it may confirm the agreement. If the agreement does not comply with the requirements the Act sets, it is invalid: s 297(2).

24 S 296(1).

25 S 294.

26 2017 (3) BCLR 267 (CC), 2017 (3) SA 570 (CC).

27 On the genetic link requirement and the right to know one's genetic origin, see further South African Law Reform Commission *The Right to Know One's Biological Origins Issue Paper 32*; Carnelley 2012 *De Jure* 179; Metz 2014 *SAJBL* 34; Van Niekerk 2015 *PELJ* 398; Boniface 2017 *TSAR* 190.

28 S 297(1)(*a*) and (*b*).

29 S 297(1)(*c*) and (*f*).

30 S 297(1)(*d*).

31 S 41(1)(*a*).

32 S 41(1)(*b*). On the issue of allowing the child "or" his or her guardian access to the information, see fn 17 above in this chapter.

33 S 41(2).

34 S 297(2).

agreement by filing a written notice with the court within 60 days after the child's birth.[35] In other words, in the case of partial surrogate motherhood,[36] the surrogate motherhood agreement may be terminated at the instance of the surrogate mother up until 60 days after the child's birth. The court must notify the parties to the agreement that a notice of termination has been filed and must hold a hearing.[37] If, at the hearing, the court finds that the surrogate mother's termination of the agreement is voluntary and that she understands the effects of the termination, it must terminate its confirmation of the agreement. The agreement then comes to an end and the commissioning parent(s) lose all responsibilities and rights in respect of the child. The court may, however, make any appropriate order that is required by the child's best interests.[38]

If the termination of the agreement occurs before the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship become the child's parents from the moment of the child's birth. If the surrogate mother does not have a spouse, civil union partner or partner in a permanent relationship, she and the commissioning father become the child's parents from the moment of the child's birth.[39]

If the agreement is terminated after the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship become the child's parents from the date of the termination. If the surrogate mother does not have a spouse, civil union partner or partner in a permanent relationship, she and the commissioning father become the child's parents from the date of the termination of the agreement.[40]

Regardless of whether the agreement is terminated before or after the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship, or the surrogate mother and the commissioning father (if the surrogate mother does not have a spouse, civil union partner or partner in a permanent relationship) are obliged to accept parenthood.[41] Therefore the termination of the agreement cannot result in the child being left parentless.

A surrogate mother may also terminate a surrogate motherhood agreement by terminating her pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996.[42] Such termination obviously does not affect the child's relationship with either the surrogate mother or the commissioning parent(s), for the child is never born and thus never acquires a relationship with anybody.

5.5 Proof of parentage

5.5.1 Introduction

The issue of who a child's parent is arises most often in the context of a dispute about paternity. Most reported cases therefore deal with matters relating to proving whether a particular man is a child's father, and not whether a particular woman is the child's mother. However, the question of who the child's mother is may arise, for example, in respect of a foundling, if babies are switched in a maternity ward,[43] if a child has been abducted, and in some cases of assisted reproduction.

35 S 298(1).
36 Partial surrogate motherhood refers to the situation where the surrogate mother is the child's genetic mother because her ovum was used for her artificial fertilisation, while full surrogate motherhood refers to the situation where a donor ovum and donor sperm were used for the surrogate mother's artificial fertilisation: Louw in Davel and Skelton (eds) *Commentary on the Children's Act* 19-3.
37 S 298(2).
38 *Ibid.*
39 S 299(*b*).
40 S 299(*a*).
41 S 299(*c*).
42 Children's Act s 300(1). On termination of pregnancy, see further ch 2 above.
43 For an example of such a case, see *Petersen v Kruger* 1975 (4) SA 171 (C).

Because paternity is in dispute more often than maternity, two presumptions of paternity have been created: one applies in respect of the child of a woman who is a party to a marriage or a civil union, and the other applies in respect of the child of a woman who is not a party to a marriage or a civil union. These presumptions are discussed under the next heading below.

Although parentage is usually based on the biological fact of being genetically related to the child, section 1(1) of the Children's Act expressly excludes three categories of persons from legally qualifying as a child's "parent". They are:

(1) The biological father of a child who was conceived through rape of or incest with the child's mother.

(2) Any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.[44]

(3) A parent whose parental responsibilities and rights in respect of the child have been terminated.

Thus, for example, a man whose child was conceived as a result of him raping the child's mother does not qualify as the child's father for the purposes of the acquisition of parental responsibilities and rights in terms of the Act. In *M v V (born N)*[45] a mother alleged, more than nine years after her child was born, that the child's father had raped her and that the child had been conceived as a result of the rape. This allegation was first made after the mother became involved with another man whom she eventually married. Although the alleged rapist had been registered as the child's father shortly after the child's birth, had contributed to the child's maintenance, had had contact with the child by agreement with the child's mother, had been involved in major decisions regarding the child's upbringing until the breakdown of the parents' relationship many years after the child's birth, and had been involved in consulting professionals regarding the child's needs for almost a decade, the mother wanted him to be excluded as the child's father by virtue of the definition of "parent" in section 1(1). The court held that, instead of making a blanket finding about the exclusion of all alleged rapists, it had to decide whether it is in the best interests of the particular child for his father to be recognised as a biological father who has parental responsibilities and rights in terms of the Act. The court based its decision on section 39(2) of the Constitution of the Republic of South Africa, 1996, which dictates that the court must promote the spirit, purport and objects of the Bill of Rights when it interprets legislation. In this case, the child's constitutional rights to parental care, to have paramountcy afforded to his or her best interests, and his or her right to dignity also had to be taken into consideration.[46] The court further referred to section 6(2)(*a*) of the Children's Act, which *inter alia* provides that, subject to lawful limitation, the court must in all proceedings concerning a child respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard, and the rights and principles set out in the Act.[47] In view of the facts of the case and, in particular, the mother's acceptance of the man as the child's father for almost ten years, the man's *de facto* exercising of parental responsibilities and rights during that period, and, most importantly, the child's recognition of the man as his father for the whole duration of his life, the court concluded that it was not in the child's best interests to exclude the alleged rapist from having parental responsibilities and rights. The court did, however, specifically state that in another case another court might arrive at a different conclusion on different facts.

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44 On artificial fertilisation and surrogacy, see above in this chapter.

45 [2011] JOL 27045 (WCC).

46 Constitution ss 28(1)(*b*), 28(2) and 10.

47 S 6 of the Children's Act is discussed in ch 6 below.

5.5.2 Presumptions of paternity

(a) A child born of a woman who is a party to a marriage or a civil union

If a child is born of a married woman or a woman who is a party to a civil union, it is presumed that the child is born of the spouses or civil union partners. In other words, if a woman is legally married or is a party to a valid heterosexual civil union at the time of the child's conception or birth or at any intervening time, it is presumed that the woman's husband or male civil union partner, and not some third party, is the child's father. This presumption is expressed in the maxim *pater est quem nuptiae demonstrant* (that is, the marriage indicates who the father is).[48]

As section 20 of the Children's Act, which confers parental responsibilities and rights on married biological fathers, expressly refers only to "biological" fathers, and not to all married fathers, it might be argued that the section qualifies, or might even have replaced, the common-law *pater est quem nuptiae demonstrant* presumption by conferring parental responsibilities and rights only on those married fathers who have proved their biological paternity.[49] In my view, it is unlikely that the courts would interpret the reference to biological fathers in section 20 in this manner, for the logical corollary would be that all mothers would also have to prove their maternity before they could acquire parental responsibilities and rights in terms of section 19 of the Act – section 19 confers parental responsibilities and rights on a child's "biological" mother, and artificial fertilisation and surrogacy imply that the child's birth mother might not be the child's biological mother. Consequently, the child could be left without having any holder of parental responsibilities and rights at the time of his or her birth and even for some time afterwards, which is clearly not in the child's best interests. It is submitted that the use of the word "biological" in section 20 should be reconciled with the *pater est quem nuptiae demonstrant* presumption by reading the reference to "father" (*pater*) in the presumption as referring to "biological father". Thus the husband or male civil union partner of the child's mother is presumed to be the biological father of the child.[50]

The *pater est quem nuptiae demonstrant* presumption can be rebutted by evidence that the man is, in fact, not the child's father; in other words, by evidence that the child was born of unmarried parents. The child's mother and/or her husband or male civil union partner can, for example, rebut the presumption by proving that they did not have sex with each other during the period when the child was conceived.[51] That the husband or male civil union partner is not the child's father must be proved on a balance of probabilities.[52]

The right to rebut the presumption does not lapse in the course of time, and the presumption can be rebutted at any time.[53] Any interested person can rebut the presumption

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48 See e.g. Grotius 1.12.3; Voet 1.6.6; *Fitzgerald v Green* 1911 EDL 432; *Williams v Williams* 1925 TPD 538; *Van Lutterveld v Engels* 1959 (2) SA 699 (A), Heaton *Casebook on the Law of Persons* case **[15]**. As indicated above in this chapter, the consequences of a civil union correspond to those of a civil marriage, and a civil union is covered by the term "marriage" except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned: Civil Union Act s 13.

49 See Bonthuys 2011 *SALJ* 430–431, who rejects this interpretation on the ground of the principle of interpretation of statutes that an Act which does not expressly change the common law leaves it intact, and the undesirable consequences of requiring all married fathers to prove paternity before they can acquire parental responsibilities and rights in terms of s 20. See also Louw *Acquisition of Parental Responsibilities and Rights* 105–106.

50 See further Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-9–3-10.

51 Civil Proceedings Evidence Act 25 of 1965 s 3.

52 *Van Lutterveld v Engels* 1959 (2) SA 699 (A).

53 But see the incorrect decision in *BR v TM; In re: LR* [2015] 4 All SA 280 (GJ), 2016 (3) SA 417 (GJ), where it was held that the paternity of a child who was born of married parents cannot be challenged in motion proceedings while divorce proceedings are pending between the mother and her husband. For criticism of this decision, see Heaton 2015 *ASSAL* 396–402; Kruger 2017 *THRHR* 326.

and not only the child's mother or her husband or civil union partner.[54] Thus, for example, the child might want to rebut the presumption if this would enable him or her to inherit.

In the past, our courts have been hesitant to declare a child who was born of a married woman to be "illegitimate". For example, in *F v L*[55] a man applied for an order declaring him to be a child's father while the child's mother was married to another man. The court rejected the application because it found that it would not be in the child's interests to be declared "illegitimate". Judge Harms held that the mother's husband was presumed to be the child's father by virtue of two presumptions. Firstly, the presumption *pater est quem nuptiae demonstrant* applied and he was thus presumed to be the child's father. Secondly, the husband also admitted that he had had sex with the child's mother during the period of conception. Thus the presumption of paternity following upon an admission of sex also applied to him. It should, however, be noted that the presumption of paternity which follows upon an admission of sex with the child's mother actually only applies when the mother is not a party to a marriage or a civil union.[56] In this case, where the mother was married, only the *pater est quem nuptiae demonstrant* presumption should have been applied. Judge Harms was therefore incorrect in holding that both presumptions operated in respect of the mother's husband.[57]

The court's conservative approach is also evident from *B v E*.[58] In this case, the mother of a child who was born during the subsistence of a marriage wanted to have the child declared to have been born of unmarried parents. The mother applied for the appointment of a *curator ad litem* to investigate whether the child was born of married or unmarried parents. The application was dismissed because the court found that it would not be in the child's best interests to be declared to have been born of unmarried parents.

The *pater est quem nuptiae demonstrant* presumption applies to children conceived before a marriage or civil union but born during its existence, and to children conceived during the marriage or civil union but born after its dissolution. Thus if a woman remarries or enters into another civil union shortly after the dissolution of her previous marriage or civil union and the presumption is consistently applied, both men could be considered the father of a child born during the early stages of the new marriage or civil union. In such event it is rebuttably presumed that the new husband or civil union partner is the child's father.[59] Although Voet[60] only refers to cases where the previous husband had died there seems to be no reason why this rule should not be applied to all cases where the previous marriage or civil union is dissolved, irrespective of the cause of its dissolution.

In terms of section 13(1) of the Civil Union Act, the legal consequences of a civil marriage apply to a civil union "with such changes as may be required by the context". Whether this means that an adapted version of the *pater est quem nuptiae demonstrant* presumption must be applied to same-sex civil unions is unclear. The presumption specifically refers to a father, while there are two male or two female parties (that is, two "fathers" or two "mothers") in a same-sex civil union. Furthermore, in the case of a same-sex civil union procreation necessarily involves artificial fertilisation, and in the case of a male couple it

54 Boezaart *Persons* 103 fn 65; Lee and Honoré par 141; Spiro *Parent and Child* 21; Spiro 1964 *Acta Juridica* 58; Boberg 1988 *Businessman's Law* 115; Jordaan 1988 *THRHR* 395. See further Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 355–356 fn 101.

55 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)).

56 Children's Status Act 82 of 1987 s 1. S 313 read with Schedule 4 of the Children's Act repealed the Children's Status Act.

57 See also Boezaart *Persons* 103; Cockrell *Bill of Rights Compendium* par 3E26 fn 7; Van der Vyver and Joubert 215; Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 366 fn 130; Boberg 1988 *Businessman's Law* 114.

58 1992 (3) SA 438 (T).

59 Voet 1.6.9; Boezaart *Persons* 103 fn 58; Hahlo and Kahn *South Africa* 353; Schäfer *Child Law* 232 fn 8; Spiro *Parent and Child* 21; Van der Vyver and Joubert 210; Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 354 fn 98.

60 1.6.9.

involves surrogate motherhood, too (unless, of course, the child is conceived through an adulterous relationship with a third party of the opposite sex). As the rules regarding artificial fertilisation and surrogate motherhood thus usually determine who the child's parents are in the case of a same-sex civil union, application of an adapted version of the presumption to such a civil union is probably not viable.[61]

(b) A child who is born of a woman who is not a party to a marriage or a civil union

In terms of section 36 of the Children's Act, a man is presumed to be the biological father of a child who is born of a woman who is not a party to a marriage or a civil union only if it is proved that he had sex with the child's mother at a time when the child could have been conceived.[62] Like the *pater est quem nuptiae demonstrant* presumption, this presumption is rebuttable. The presumption operates in the absence of evidence to the contrary which raises a reasonable doubt. Normally the *onus* of proof or rebuttal in civil matters is proof or rebuttal on a balance of probabilities.[63] Requiring evidence to the contrary "which raises a reasonable doubt", as section 36 does, is a departure from the ordinary rule.[64] It also creates a discrepancy when compared to the *onus* that applies in respect of rebutting the *pater est quem nuptiae demonstrant* presumption, for the latter presumption may be rebutted on a balance of probabilities.[65]

It is submitted that this discrepancy amounts to an infringement of the right to equality before the law and equal protection and benefit of the law because an unmarried man must discharge a heavier burden of proof than a married man has to. A child who was born to a woman who is not a party to a marriage or a civil union and who wanted to attack the discrepancy on constitutional grounds could also rely on his or her right not to be subject to unfair discrimination on the ground of birth, while an alleged father who wanted to attack the discrepancy could also rely on his right not to be subject to unfair discrimination on the ground of marital status.[66] There does not seem to be any justification for any of these limitations of the right to equality.[67]

Any acceptable evidence suffices to rebut the presumption, regardless of whether it is direct or circumstantial,[68] provided, of course, that it is sufficient to raise a reasonable doubt.

5.5.3 Corroboration of the mother's evidence

As far as proof of sexual intercourse is concerned, the courts formerly did not accept the mother's evidence without corroboration.[69] This rule was rejected by the then Appellate

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61 See also Heaton and Kruger *Family Law* 211; Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-43–3-44; Heaton in Gerber and Sifris (eds) *Current Trends* 114–115; De Ru 2013 *Fundamina* 247.

62 Children's Act s 36.

63 See e.g. Schwikkard and Van der Merwe *Evidence* par 32.7.

64 It is also a departure from the approach adopted in respect of the predecessor of s 36 of the Children's Act, namely s 1 of the Children's Status Act: Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-44. See also Domingo and Barratt in Barratt (ed.) *Persons and the Family* 197 fn 148.

65 *Van Lutterveld v Engels* 1959 (2) SA 699 (A).

66 See also Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-44; Schäfer *Child Law* 233. S 9(1) and (3) of the Constitution protects the right to equality before the law and equal protection and benefit of the law and the right not to be subject to unfair discrimination, *inter alia*, on the grounds of marital status and birth.

67 S 36 of the Constitution contains the criteria for determining whether a limitation of a fundamental right is justifiable.

68 This was the approach adopted in *S v L* 1992 (3) SA 713 (E) in respect of the meaning of the word "evidence" in s 1 of the Children's Status Act. There does not seem to be any reason to adopt a different approach under s 36 of the Children's Act.

69 In *Mackay v Ballot* 1921 TPD 430 432 Stratford J said that by corroboration he understood "that some evidence must be given in addition to the woman's, which, *in some degree*, is consistent with her story and inconsistent with the innocence of the defendant". See also *Wiehman v Simon* 1938 AD 447; *Maharaj v Parandaya* 1939 NPD 239; *Holloway v Stander* 1969 (3) SA 291 (A).

Division (now the Supreme Court of Appeal) in *Mayer v Williams.*[70] The court pointed out, *inter alia,* that the rule is based on a misunderstanding of Roman-Dutch law and that it is an anomaly that in such instances there is a heavier burden of proof in civil cases than criminal matters. The court, however, stated that in paternity cases the mother's evidence should be very carefully scrutinised. In this regard, the judge referred to the cautionary rule in criminal proceedings concerning sexual offences.[71] He could see no reason why the same rule should not also be applied in civil proceedings. The cautionary rule requires the court to recognise the inherent danger of relying on a complainant's evidence in respect of a sexual offence and also to recognise the need for some safeguard reducing the risk of a wrong conviction. Such a safeguard may be found in corroboration, the absence of contradictory evidence, or the untruthfulness of the accused as a witness. Therefore, the plaintiff's testimony does not always require corroboration but corroboration may serve as a safeguard. The decision in *Mayer v Williams* in respect of application of the cautionary rule to women's testimony in paternity suits will most probably not be followed in future because the cautionary rule has been abolished in respect of sexual offences.[72] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that a court may not treat the evidence of a complainant in respect of a sexual offence with caution because the evidence relates to an offence of a sexual nature.

5.5.4 Factors which may be relevant in proving paternity or rebutting a presumption of paternity

(a) Absence of sexual intercourse

If it can be proved that the man who is presumed to be the child's father did not have sex with the child's mother at any time when the child could have been conceived (for example, because he is impotent or was elsewhere at the time), the presumption of paternity is rebutted.[73]

(b) The gestation period

To establish who a child's father is, it is often necessary to determine the period of gestation. In our law there is no fixed gestation period. The courts make a decision on an *ad hoc* basis, sometimes relying on medical evidence as to when conception could have taken place, other times taking judicial notice of the "normal" period of gestation.[74] The normal period of gestation is more or less 270 to 280 days but, as is indicated above in this chapter, the courts have adopted a conservative approach towards declaring a child to have been born of unmarried parents. As a result, long periods of gestation have been accepted. In *Williams v Williams,*[75] for example, the court, in the absence of medical evidence, was not prepared to hold that the eleventh month was beyond the period of gestation, and in *Mitchell v Mitchell*[76] a gestation period of 320 days was accepted. In contrast, it has been held that a gestation period of only 206 days was impossible.[77] However, with advances in medical treatment for, and increased survival rates of even very premature babies the courts may well in future revise their view on the minimum period of gestation.

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70 1981 (3) SA 348 (A), Heaton *Casebook on the Law of Persons* case **[16]**.
71 *S v Snyman* 1968 (2) SA 582 (A).
72 See also Boezaart *Persons* 113; Cronjé *LAWSA* vol 20 part 1 *Persons* par 453; Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 364 fn 127.
73 See e.g. *Fitzgerald v Green* 1911 EDL 432; *Atkin v Estate Bowmer* 1913 CPD 505; *R v Isaacs* 1954 (1) SA 266 (N).
74 Boezaart *Persons* 105; Hahlo and Kahn *South Africa* 353; Van der Vyver and Joubert 211; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 357; Labuschagne 1984 *De Jure* 337–339.
75 1925 TPD 538.
76 1963 (2) SA 505 (D), Heaton *Casebook on the Law of Persons* case **[17]**.
77 *Gradidge v Gradidge* 1948 (1) SA 120 (D).

(c) Sterility

Proof of sterility obviously shows that the man is not the child's father.[78]

(d) The *exceptio plurium concubentium*

Sometimes a man admits that he had sex with a woman during the time the child could have been conceived, but then alleges and proves that the woman also had sex with another man or other men during that period. This defence is known as the *exceptio plurium concubentium.* Although our common-law authors are not unanimous on the *exceptio plurium concubentium* and the Appellate Division left the issue of the applicability of the *exceptio* in modern law open in *S v Swart,*[79] the generally accepted view nowadays is that the *exceptio* does not form part of our law.[80] Accordingly it is of no avail to a man to prove that other men also had sex with the child's mother.

It must be noted that this approach gives rise to problems. Suppose, for example, that the woman points out A as the child's father and A proves that he is sterile. Can the woman now simply point out B? In *F v L*[81] it was said that the woman's selection "is presumably irrevocable" and that a man is absolved from liability for maintenance once the mother has selected another man as the father. In other words, once she has named A as the father, B can rest assured that he cannot later be named as the child's father. However, it must be borne in mind that the child's best interests should be paramount.[82] It is not in the best interests of the child completely to exclude the possibility of the child's having a maintenance or succession claim against a man (B) or the estate of a man who might actually be the child's father just because the child's mother has named another man (A) as the child's father. It is therefore submitted that the child should not be bound by the choice his or her mother has made in respect of naming a particular man as his or her father.

What is the position if a man other than the one the mother has named wants to prove that he is the child's father? This question also arose in *F v L.* In this case a woman had had sex with two men during the period when conception could have occurred. She married one of them. A few years later the other man applied for an order declaring him to be the child's father. The court held that, in such a case, "the law gives the mother the right to choose or appoint"[83] the father. Here she had chosen her husband and the other possible father could not interfere with that choice. Judge Harms stated:

> I know of no principle that gives the jilted lover the right to interfere with her choice nor do I believe it to be in the public interest to create such a right.[84]

He conceded that the position might be different if it were in the child's interests that the other man be allowed to contest the mother's choice, but he was of the view that in the present case the child's welfare was "not an issue". The judge's view was presumably based on the argument that the effect of the declaratory order sought "may not only be devastating for the child", but would also have serious legal consequences for him, since it would deprive him of an existing right of maintenance.[85] It was accordingly held that the applicant was not entitled to a declaration that the child was born of unmarried parents by having himself declared the child's father.

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78 See e.g. *Fitzgerald v Green* 1911 EDL 432; *Williams v Williams* 1925 TPD 538; *R v Pie* 1948 (3) SA 1117 (O); *R v Swanepoel* 1954 (4) SA 31 (O); *Van Lutterveld v Engels* 1959 (2) SA 699 (A).

79 1965 (3) SA 454 (A).

80 *S v Jeggels* 1962 (3) SA 704 (C); *Gin v S* 1966 (2) PH H335 (E); *A v C* 1986 (4) SA 227 (C); Cronjé *LAWSA* vol 20 part 1 *Persons* par 453; Domingo and Barratt in Barratt (ed.) *Persons and the Family* 196; Schäfer *Child Law* 233; Schäfer in Clark (ed.) *Family Law Service* par E15; Van den Heever 63; Van der Vyver and Joubert 214, 218; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 358–359, 368.

81 1987 (4) SA 525 (W) 528 (also reported as *D v L* 1990 (1) SA 894 (W)).

82 Constitution s 28(2).

83 528D; see also *Macdonald v Stander* 1935 AD 325.

84 528E.

85 528F.

It is submitted that the view that the mother has the right to choose the child's father should be reconsidered. Today sophisticated scientific tests can be used to determine with a very high degree of accuracy whether or not a particular man is a child's father.[86] It would surely be better if the father's identity could be established by a more objective test than only the mother's choice. Furthermore, giving the mother the right to choose the father of her child violates the other possible fathers' right to equality before the law and equal protection and benefit of the law.[87] Depending on the circumstances of the case, it may also infringe the child's right to parental care and the child's right to have paramountcy afforded to his or her best interests.[88]

(e) Physical features

The fact that the physical features of the child do or do not resemble those of the alleged father does not bear much weight in proving or disproving paternity. Physical appearance may, however, be considered in conjunction with other factors which prove or disprove paternity.[89]

(f) Contraceptives

Evidence that a contraceptive device was used during sex is not recognised as sufficient proof that a particular man is not the child's father.[90]

(g) Scientific tests

(i) *Common scientific paternity tests*

Various scientific tests can be used to exclude a person as a child's parent or to show that the person is probably the child's parent. Red blood cell tests can only exclude a person. HLA (that is, human leukocyte antigen) tests, which are performed on white blood cells, can indicate with a high degree of probability whether a particular person could be the parent of a particular child. DNA (that is, deoxyribonucleic acid, desoxyribonucleic acid) tests are even more accurate in indicating parentage. DNA can be obtained from blood, saliva, semen, genital fluids, hair, muscle, skin, and so forth.[91]

(ii) *The court's power to order scientific tests in a paternity dispute*

Until a few decades ago, scientific tests were seldom used in South Africa in paternity disputes, because these tests were not as reliable as they are nowadays. Furthermore, in the case of blood tests, the blood of all three parties (that is, the alleged father, alleged mother and the child) was needed in order to obtain a result.[92] If the parties voluntarily submitted themselves and the child to a paternity test, the courts were prepared to accept the results as evidence. For example, in *Ranjith v Sheela*[93] the mother's husband alleged that he did not have sex with her at the time when the child was conceived. Blood tests were performed and the results were accepted as sufficient proof that the husband could not be the child's father. In *Van der Harst v Viljoen*[94] the plaintiff averred that the defendant had had sex with her. The defendant denied this. However, the results of blood tests corroborated her evidence and showed an overwhelming probability that the defendant was the child's

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86 See the discussion on scientific tests below in this chapter.
87 Constitution s 9(1). See further Cockrell *Bill of Rights Compendium* par 3E26.
88 Constitution s 28(1)(*b*) and (2); Children's Act s 6(2)(*a*).
89 *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O).
90 *R v Swanepoel* 1954 (4) SA 31 (O); *S v Jeggels* 1962 (3) SA 704 (C).
91 On these scientific tests, see e.g. Dettmeyer, Verhoff and Schütz *Forensic Medicine* ch 22; Lupton in Clark (ed.) *Family Law Service* pars J72–J76; Schäfer *Child Law* 234; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 369–371 fn 142; Böhm and Taitz 1986 *SALJ* 662; Böhm, Taitz and Van Helden 1987 *SALJ* 307; Taitz 1992 *SALJ* 270; Goodwin and Meintjes-Van der Walt 1997 *SALJ* 151.
92 See e.g. *M v R* 1989 (1) SA 416 (O).
93 1965 (3) SA 103 (D).
94 1977 (1) SA 795 (C).

father. Again this evidence was accepted. However, if one of the parties refused to have blood or other samples taken from them or the child, the matter became much more complicated because of the decision in the old case of *E v E*[95] that the court could not compel anyone to submit to blood tests.

Nowadays paternity can be established by using the DNA of the child and the alleged father without any involvement of the mother.[96] Scientific paternity tests are sometimes even used by the father without the knowledge of the mother or the child, or by the child without the knowledge of either of his or her parents. Despite the increased use and reliability of paternity tests, the issue of whether the court has the power to compel a child and/or an adult to submit to a scientific test in a paternity dispute remains everything but simple.

The legislature could have settled the issue by conferring on, or denying, the court the power to make such orders, but it has failed to do so. Instead, it enacted section 37 of the Children's Act which simply provides that if a party to a paternity dispute refuses to submit himself or herself or a child to the taking of a blood sample for the purposes of scientific paternity tests, the court must warn that party of the effect the refusal might have on his or her credibility. This provision is the successor to section 2 of the Children's Status Act 82 of 1987, which compelled the court to presume, until the contrary was proved, that the person's refusal to submit himself or herself or the child to blood tests "is aimed at concealing the truth concerning the paternity of that child". Unlike section 2 of the Children's Status Act, section 37 of the Children's Act does not create a presumption of dishonesty; it merely compels the court to warn the person "of the effect which such refusal might have" on his or her credibility. Therefore the incentive in section 37 for submitting to scientific paternity tests is weaker than that which operated under the Children's Status Act.[97] Furthermore, it should be noted that section 37 applies only to blood tests, even though DNA can be obtained from other material.[98]

In the absence of a clear legislative statement, the courts have been left to deliberate on their power to order children and unwilling adults to submit to scientific tests to establish paternity. In respect of the court's power to order tests on a minor against the wishes of his or her parent,[99] most courts have held that the High Court acting in its capacity as the upper guardian of all minors may order tests provided that they are in the best interests of the particular minor. However, the courts have by no means been unanimous on the circumstances in which such tests are in the best interests of the child.

In *Seetal v Pravitha*[100] the blood test that was sought, could have disproved the paternity of the mother's husband, with the result that the child would have been a child born of unmarried parents and would have been deprived of his right to claim maintenance from his mother's husband. The court held that these circumstances meant that the test would not be in the child's interests. It accordingly declined to order the blood test.

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95 1940 TPD 333.

96 See e.g. Von Wurmb-Schwark, Mályusz, Simeoni, Lignitz and Poetsch 2000 *Forensic Science International* 92; Bonthuys 2011 *SALJ* 433; Huang and Cai 2016 *International Journal of Legal Medicine* 1205. These tests are called "motherless paternity tests". Home-kits for motherless paternity tests are freely available in many countries, including South Africa, and can even be ordered online: see e.g. https://www.easydna.co.za/testing-mother-in-paternity-test/, accessed 17 August 2017.

97 See also Boezaart *Persons* 109 fn 134; Louw *Acquisition of Parental Responsibilities and Rights* 109 fn 293; Schäfer *Child Law* 235; Skelton in Boezaart (ed.) *Child Law in South Africa* 79 fn 77.

98 See the preceding paragraph. See also Schäfer *Child Law* 235.

99 In some instances the minor has the capacity to consent to the tests with the result that the consent of his or her guardian is not required. On the capacity of a minor to consent to medical treatment and operations, see ch 6 below.

100 1983 (3) SA 827 (D).

In *O v O*[101] the court declined to make an order authorising blood tests on these and other grounds. Here the applicant was the former husband of the child's mother. He did not dispute his paternity until the child was around six years old. The court held that the tests would not be in the child's interests because she and the applicant had a close and loving relationship; it would have a devastating effect on her and her relationship with the applicant if the tests were to show that the applicant was not her father, and she would become a child born of unmarried parents; the whereabouts, financial position, and so forth of the only other possible man who could be her father were unknown; and if the tests were to prove that the applicant was indeed her father, she would resent him if she ever discovered that he had had paternity tests done.

In contrast, the court found in *M v R*[102] that an order compelling blood tests would be in the interests of the particular child whose paternity was in dispute. In this case, an unmarried man applied for an order compelling the child's mother to submit herself and the child to blood tests. The child's mother had married three years after the child's birth and the child accepted and loved his mother's husband as his father. The mother and her husband were planning to tell the child the following year that the applicant was actually his father. For the court, this was the decisive factor. It held that if this disclosure were made to the child and it subsequently appeared that the applicant was not the father, the child would suffer extreme psychological damage, which should be avoided at all costs. The court stated that it was crucial for the child's development and happiness that clarity as regards the applicant's paternity should be obtained. It further held that although taking blood samples would infringe the mother's right to privacy, she should, as the child's guardian, act in the child's interests even if those interests clashed with her own – as happened in this case.

In *S v L*,[103] however, the court held that it does not have the power to interfere with the decision of a child's parent not to subject the child to blood tests, even if the court would have come to a different decision. It accordingly refused to order a test against the wishes of the child's mother.

Fortunately, the Supreme Court of Appeal eventually settled the issue of the court's power to make an order that scientific tests be performed on a blood or other sample from a child. In *YM v LB*[104] the Supreme Court of Appeal confirmed that the High Court as upper guardian of minors has an inherent power to order such tests in a paternity dispute if the order is in the child's best interests. The court did not give any guidance on the circumstances in which such order would be in the child's best interests.[105] It did, however, in an *obiter dictum* state that it is not always in an individual's interests to know the truth and that, in each case, the court must consider whether it is in the interests of the particular child to know the truth about the identity of his or her father.[106] The latter statement has been criticised on the ground that it violates the child's right to know his or her genetic parents or his or her genetic origin.[107] However, it is submitted that the court's statement is in keeping with the view of the Constitutional Court that a child-centred approach is needed in all matters involving children and that the court must undertake "a close and individualised examination of the precise real-life situation of the particular child involved".[108] Thus

101 1992 (4) SA 137 (C).
102 1989 (1) SA 416 (O).
103 1992 (3) SA 713 (E), Heaton *Casebook on the Law of Persons* case **[18]**.
104 2010 (6) SA 338 (SCA), Heaton *Casebook on the Law of Persons* case **[20]**.
105 For criticism of the court's failure to provide such guidance, see Bonthuys 2011 *SALJ* 433–434.
106 Par [16].
107 See e.g. Bonthuys 2011 *SALJ* 432. Schäfer *Child Law* 235 is of the view that it is "unlikely that there will be many cases in which a court could legitimately conclude that a child is better off not knowing the truth of his paternity".
108 *M v S* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)) par [24]. For a discussion of the implications of an individualised, contextualised, child-centred approach, see Heaton 2009 *JJS* 1.

the court must attach such weight to each of the relevant factors (including the child's interest in knowing the identity of his or her father) as it sees fit, and must ultimately reach a conclusion based on a value judgement on what is in the child's best interests in the particular case.[109]

Conflicting decisions have also been handed down on the court's power to compel an unwilling adult to submit to scientific tests in a paternity dispute. This conflict has not yet been resolved because the Supreme Court of Appeal did not have to decide this issue in *YM v LB* as it held that there was no dispute about paternity in this case and consequently there was no need to order a DNA test. Thus, we are left with the conflicting decisions of various judges of the High Court.

In *O v O*[110] the court stated in an *obiter dictum* that it cannot order an unwilling adult to submit to paternity tests as there "is no statutory nor common-law power enabling the court to order an adult to allow a blood sample to be taken for the purpose of establishing paternity".[111] In *Nell v Nell*[112] and *S v L*[113] the courts refused to order blood tests on adults. In *Nell v Nell* the application was based on two grounds. Firstly, the applicant relied on a clause in an agreement between him and his wife in terms of which they had undertaken to submit to blood tests in order to establish the child's paternity. The court refused to make an order for specific performance in respect of this agreement, *inter alia*, because the papers before it contained no details of the tests to be done on the mother. The court therefore did not know how much of the human body would be removed and from where it would be removed.[114] The second ground on which the applicant based his case was that the court has an inherent power to regulate its procedures. On this basis it was argued that the court could order an unwilling adult to submit to a blood test because the court may search for and collect evidence, which is a procedural matter.[115] This argument was rejected on the ground that ordering someone to submit to a blood test is not merely a procedural matter, because the order also affects principles of substantive law[116] in that the test involves a violation of the person's bodily integrity.[117] The court stated that it could be very difficult to draw the dividing line between substantive and procedural law and that where this line could not be clearly drawn a remedy was probably not available. It further stated that even if ordering a blood test were a purely procedural matter, it would still not grant the order since the test would not be in the interests of the child.[118]

That an order compelling a person to have a sample taken for purposes of a paternity test involves more than a procedural matter, was also the court's view in *S v L*[119] and *D v K*.[120] In *S v L* the court further held that the alleged father had approached the wrong forum. Instead of approaching the High Court for an order requiring the mother and child to submit to blood tests, he should have proceeded in the Maintenance Court and adduced proof of the mother's refusal to consent to blood tests in that court. If her refusal were

109 See e.g. *K v M* [2007] 4 All SA 883 (E); *P v P* [2007] 3 All SA 9 (SCA), 2007 (5) SA 94 (SCA).
110 1992 (4) SA 137 (C).
111 139J.
112 1990 (3) SA 889 (T).
113 1992 (3) SA 713 (E).
114 In *S v L* 1992 (3) SA 713 (E), too, the fact that the papers did not contain any information regarding the precise nature of the proposed tests was an important factor in the court's refusal to grant the order. Anyone who approaches the court for an order compelling someone to submit to scientific paternity tests would therefore be well advised to submit full details to the court of exactly what the tests entail.
115 See also *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O).
116 This view was also adopted in *S v L* 1992 (3) SA 713 (E) and *D v K* 1997 (2) BCLR 209 (N). See further *O v O* 1992 (4) SA 137 (C). On the distinction between substantive and procedural/adjective law, see e.g. Schwikkard and Van der Merwe *Evidence* pars 4.1–4.2; Zeffertt 1990 *SALJ* 579 *et seq.*
117 See also *Seetal v Pravitha* 1983 (3) SA 827 (D); Zeffertt 1990 *SALJ* 582.
118 See also *S v L* 1992 (3) SA 713 (E); *O v O* 1992 (4) SA 137 (C).
119 1992 (3) SA 713 (E).
120 1997 (2) BCLR 209 (N), Heaton *Casebook on the Law of Persons* case **[19]**.

found to be without adequate reason, the applicant could have relied on the presumption in the Children's Status Act that the refusal was "aimed at concealing the truth regarding the paternity of that child".[121] He would then in all probability not have been ordered to pay maintenance for the child. It is submitted that this argument is unsatisfactory. Although application of the presumption in the Children's Status Act – which has since been replaced by the presumption in section 37 of the Children's Act[122] – might have meant that the person in whose favour the presumption operated would not have to pay maintenance, it still would not have answered the question as to his paternity – which might have been the issue he actually wanted resolved.

In *M v R*[123] the court pointed out that the issue of compelling an adult to submit to scientific tests in a paternity dispute involves conflicting interests: on the one hand there is the pursuit of truth and on the other hand the right to privacy of the person who does not want to submit to the tests. The court concluded that it has an inherent power to compel an unwilling mother to submit to tests. In this case, the court ordered the mother to submit to tests, *inter alia* because it was in her child's best interests to establish whether the applicant was his father and because it is the ideal of every court to establish the truth as far as possible.

From the discussion above it is clear that our courts have generally been reluctant to make an order compelling a mother to submit herself or her child to scientific tests in paternity disputes – especially if these tests could prove that a man who is paying maintenance for the child is not the child's father, with the result that the child would lose the maintenance.[124] This view was correctly rejected in *M v R*[125] on the ground that money which is wrongly taken from a man who is not really the child's father is not a "benefit" that should be taken into account and protected by the court.

With the coming into operation of the Bill of Rights, a constitutional dimension has been added to the picture. In terms of section 14 of the Constitution, every person has a right to privacy, while section 12(2) of the Constitution provides that every person has the right to bodily and psychological integrity, which includes the right to security in and control over one's body. The constitutional issue is whether a court order compelling someone to submit to scientific tests unjustifiably infringes these rights. In *D v K*[126] the view was, correctly, expressed that an order compelling a person to submit to a blood test would infringe the person's constitutional right to privacy. This remark was based on section 13 of the interim Constitution.[127] The privacy clause in the final Constitution is similar to that contained in the interim Constitution. In addition, the Constitution now protects the right to bodily and psychological integrity. Now an order compelling a person to submit to scientific tests in a paternity suit violates not only the constitutional right to privacy but also the right to bodily integrity. Section 28(1)(*b*) and section 28(2) of the Constitution also come into play. They entitle the child to parental care and provide that the best interests of the child must be of paramount importance in every matter concerning the child.[128] Rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored or that limitations of the child's best interests are impermissible.[129] Instead, the child's best interests must be applied

121 See also *D v K* 1997 (2) BCLR 209 (N).
122 S 37 of the Children's Act is discussed above under this heading.
123 1989 (1) SA 416 (O).
124 See e.g. *Seetal v Pravitha* 1983 (3) SA 827 (D).
125 1989 (1) SA 416 (O).
126 1997 (2) BCLR 209 (N).
127 Constitution of the Republic of South Africa 200 of 1993.
128 On s 28 of the Constitution, see further ch 6 below.
129 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC), 2000 (3) SA 422 (CC); *LS v AT* 2001 (2) BCLR 152 (CC) (also reported as *Sonderup v Tondelli* 2001 (1) SA 1171 (CC)); *M v S (Centre for Child Law* Amicus Curiae*)* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)).

"in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests".[130] Thus the court must weigh up the competing interests of the child and the adult and undertake a proportionality assessment to determine which rights should prevail in each particular case.[131]

Finally, *Ex parte Emmerson*[132] should be mentioned. In this case, a pregnant woman applied for an order authorising DNA tests on skin, blood and muscle samples of a man who had been killed in a motor vehicle accident. She wanted the tests to be done to prove that the deceased was the father of her unborn child so that she could lodge a claim for maintenance against his estate. The order was granted, but because of the extreme urgency of the matter the court did not give reasons for its order. As regards this decision it has to be borne in mind that the tests were to be done on a deceased person. As is pointed out in chapter 2 above, a deceased person is no longer a legal subject and therefore has no rights.[133] The considerations which come into play if a request is made for an order authorising samples to be taken from a corpse are therefore not the same as those which arise in the case of a living person. For instance, a dead person does not have a right to bodily integrity or privacy. However, this does not mean that anyone who wants to prove or disprove parentage by means of scientific tests may simply remove samples from a corpse, as this may amount to the crime of violating a corpse, and may furthermore violate community interests and the feelings of the deceased's next-of-kin,[134] which might result in delictual liability.

(iii) *The court's power to take judicial notice of the technique and reliability of scientific paternity tests*

A further point regarding scientific paternity tests about which there is uncertainty is whether a court may take judicial notice of the technique and results of these tests. In *Nell v Nell*[135] the court refused an order for blood tests *inter alia* because the papers before it contained no details of the tests to be done and the court therefore did not know how much of the human body would be removed and from where it would be removed. In contrast, in the judgment of the court *a quo* in *S v L*[136] Judge Burger was of the view that he could take judicial notice of the technique and accuracy of blood tests. The full bench doubted whether this approach was correct and expressed its misgivings as to whether developments in the technique of blood testing had advanced to such a degree that judicial notice could be taken of the fact that blood tests could exclude a man as the father with a 99,85% probability of accuracy, and the corollary, that if he was not excluded, he probably was the father.

It is submitted that Judge Burger was indeed justified in taking judicial notice of the technique and results of blood tests and that the same applies to DNA tests. The value and accuracy of blood and DNA tests is widely recognised nowadays. In terms of section 21 of the Maintenance Act 99 of 1998, a court may even order the state to pay the full or part of

130 *M v S (Centre for Child Law* Amicus Curiae) 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)) par [25]. See also *YM v LB* 2010 (6) SA 338 (SCA) par [15].

131 See further Cockrell *Bill of Rights Compendium* par 3E26; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 383; Heaton 1986 (2) *Codicillus* 45; Singh 1993 *De Jure* 123–124; Labuschagne 1993 *TSAR* 482; Davel and De Kock 2001 *De Jure* 288; Bonthuys 2011 *SALJ* 434–435. If a paternity test was done without the consent of the mother or the court – which is possible since the mother's DNA is no longer required to establish paternity (see above in this chapter) – the mother's right to privacy was violated by the test. In such event, a court which is asked to admit the results of the test would also have to weigh all the competing interests and undertake a proportionality test in deciding whether the results are admissible. On the admissibility of the results of motherless paternity tests done without the knowledge of the mother, see also Bonthuys 2011 *SALJ* 435.

132 1992 (3) SA 987 (W).

133 See ch 1 above.

134 See ch 2 above.

135 1990 (3) SA 889 (T).

136 1992 (3) SA 713 (E).

the costs of the taking of blood samples in order to carry out scientific tests to determine paternity if both parties agree to submit to the tests but cannot afford to pay for them. Surely the courts should be prepared to take judicial notice of the technique and reliability of, at the very least, blood tests if the legislature considers these tests accurate enough to warrant the state bearing the costs of the tests in Maintenance Court cases.

5.6 The legal relationship between a child and his or her unmarried parents

5.6.1 Introduction

In terms of the common law, the mother of an "illegitimate" child had parental authority (or parental power) over her child, unless she was a minor.[137] The child's father had no parental authority even if he lived with the child's mother. He could, however, approach the High Court in its capacity as upper guardian of all minors for an order conferring any or all of the elements of parental authority on him if this was in the best interests of the child.[138] Regardless of whether the father had parental authority, he had to support his child.[139]

The Children's Status Act and Natural Fathers of Children Born out of Wedlock Act 86 of 1997 subsequently partly codified the law relating to the parental authority of unmarried parents. These Acts essentially confirmed the common-law position. In terms of the Children's Status Act, the mother was the child's guardian and custodian (care-giving parent) unless she was an unmarried minor.[140] If she was an unmarried minor, guardianship vested in her guardian but she had custody (care) unless a court directed otherwise.[141] As far as the father's position was concerned, the Natural Fathers of Children Born out of Wedlock Act afforded the High Court a statutory power to award guardianship and/or custody (care) and/or access (contact) to him if this was in the best interests of the child.[142]

In 2007, when the first batch of sections of the Children's Act came into operation, the position changed radically. The Children's Act *inter alia* repealed and replaced the Children's Status Act and the Natural Fathers of Children Born out of Wedlock Act. It also substituted the term "parental responsibilities and rights" for "parental authority" and, for the first time, conferred automatic parental responsibilities and rights on some unmarried fathers.

5.6.2 Definition and components of parental responsibilities and rights

Section 1(1) read with section 18(2) of the Children's Act defines parental responsibilities and rights non-exhaustively to include caring for the child, maintaining contact with the child, acting as the child's guardian, and contributing to the child's maintenance.

(a) Care

In terms of section 1(1) of the Act, "care" refers to the following:

(1) Within available means, providing the child with a suitable place to live, living conditions which are conducive to his or her health, well-being and development, and the necessary financial support. Thus care encompasses providing the child with

137 See e.g. Voet 27.2.1; *Docrat v Bhayat* 1932 TPD 125; *Dhanabakium v Subramanian* 1943 AD 160; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E); *F v L* 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)).

138 See e.g. *Rowan v Faifer* 1953 (2) SA 705 (E); *Ex parte Van Dam* 1973 (2) SA 182 (W).

139 See e.g. Grotius 3.35.8; *Lamb v Sack* 1974 (2) SA 670 (T); *Tate v Jurado* 1976 (4) SA 238 (W); *Van der Harst v Viljoen* 1977 (1) SA 795 (C); *Sager v Bezuidenhout* 1980 (3) SA 1005 (O). See also s 15(3)(*a*)(iii) of the Maintenance Act.

140 S 3(1).

141 *Ibid.*

142 S 2(1) and (2).

maintenance. However, the inclusion of maintenance under the statutory definition of "care" does not mean that the common-law duty of support has suddenly ceased to exist. Because the Children's Act did not expressly abolish the common-law rules relating to maintenance of a child, all parents still have a duty to support their child, regardless of whether they have parental responsibilities and rights in respect of the child.[143]

(2) Safeguarding and promoting the child's well-being.

(3) Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards.

(4) Respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's constitutional rights and the rights set out in the Children's Act.

(5) Guiding and directing the child's education and upbringing in a manner which is appropriate to the child's age, maturity and stage of development.

(6) Guiding, advising and assisting the child in decisions he or she has to take, bearing in mind the child's age, maturity and stage of development.

(7) Guiding the child's behaviour in a humane manner.

(8) Maintaining a sound relationship with the child.

(9) Generally ensuring that the child's best interest is the paramount concern in all matters affecting the child.

(b) Contact

"Contact" refers to maintaining a personal relationship with the child and communicating with him or her on a regular basis if he or she lives with someone else. The communication may take place in person (for example, by visiting or being visited by the child) or in another way (for example, via telephone calls, letters, videos, video calls, electronic mail, mobile phone text messages, or social media).[144]

(c) Guardianship

"Guardianship" refers to administering and safeguarding the child's property and property interests, assisting or representing the child in administrative, contractual and other legal matters, and giving or refusing any consent that is legally required in respect of the child.[145]

(d) Maintenance

As indicated above, both parents have the duty to support their child. This duty is apportioned between them according to their respective means.[146]

If an unmarried parent dies, his or her estate is responsible for the child's maintenance.[147] If neither parent (or the parent's estate) can support the child, the duty of support passes to the child's grandparents.[148] In terms of the 1930 decision of the Appellate Division in *Motan v Joosub*,[149] only maternal grandparents are liable for the child's maintenance. However, in *Petersen v Maintenance Officer*[150] the Cape Provincial Division of the High Court

143 See also Boezaart *Persons* 121; Domingo and Barratt in Barratt (ed.) *Persons and the Family* 190; Heaton and Kruger *Family Law* 302; Schäfer *Child Law* 226.

144 S 1(1).

145 S 1(1) read with s 18(3).

146 Maintenance Act s 15(3)(*a*)(ii).

147 See e.g. *Kramer v Findlay's Executors* (1878) 8 Buch 51; *Carelse v Estate De Vries* (1906) 23 SC 532; *Spies' Executors v Beyers* 1908 TS 473; *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A).

148 *Ex parte Jacobs* 1936 OPD 31; *Gliksman v Talekinsky* 1955 (4) SA 468 (W).

149 1930 AD 61, Heaton *Casebook on the Law of Persons* case **[22]**; see also *F v L* 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)).

150 [2004] 1 All SA 117 (C), 2004 (2) BCLR 205 (C) (also reported as *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C)), Heaton *Casebook on the Law of Persons* case **[23]**.

(now the Western Cape Division of the High Court, Cape Town) declared this rule unconstitutional on the ground that it unjustifiably violated the right of a child born of unmarried parents not to be subject to unfair discrimination on the ground of birth and the child's right to dignity, and also failed to afford paramountcy to the child's best interests.[151] Even though this decision does not bind all courts, there is little doubt that it will be followed and that, in future, courts will hold maternal and paternal grandparents liable for support regardless of whether their grandchild was born of married or unmarried parents.[152]

From our common law it is clear that a child who is born of unmarried parents must support his or her mother and maternal blood relations.[153] The position as far as the child's father and his blood relations are concerned is not quite as clear, for some authors mention the possibility that the father and his relations might not have a right to claim maintenance from the child.[154] However, denying an unmarried father and his blood relations the right to claim maintenance from the child purely because the child was born of unmarried parents would constitute an unjustifiable violation of the equality clause,[155] and would be unconstitutional.[156]

5.6.3 Parental responsibilities and rights of the mother

In terms of section 19 of the Act, every biological mother apart from a surrogate mother[157] acquires full parental responsibilities and rights in respect of her child when she gives birth to the child.[158] This rule applies regardless of whether the mother is married or unmarried.

An exception regarding guardianship applies if the mother is unmarried and a minor (that is, a person below the age of 18 years)[159] and neither she nor the child's biological father has guardianship in respect of the child. In such event her guardian is also her child's guardian.[160]

5.6.4 Parental responsibilities and rights of the father

(a) Introduction

As is pointed out above in this chapter, the Children's Act[161] replaced the common-law and statutory provisions that denied unmarried fathers inherent parental authority with rules which, *inter alia,* automatically confer parental responsibilities and rights on certain unmarried fathers.[162] Many arguments have been raised in favour of, and against, granting automatic responsibilities and rights to unmarried fathers. It has been argued, *inter alia,* that

151 The right not to be subject to unfair discrimination on the ground of birth is protected by s 9(3) of the Constitution, while s 10 of the Constitution protects the right to dignity. S 28(2) of the Constitution provides that the child's best interests must be paramount in every matter concerning the child.

152 See also Boezaart *Persons* 122; Heaton and Kruger *Family Law* 306; Robinson in Atkin (ed.) 2007 *International Survey of Family Law* 283; Skelton and Carnelley (eds) *Family Law* 355; Bekink 2008 *De Jure* 154.

153 *D* 25.3.5.4; Voet 25.3.8.

154 Hahlo and Kahn *South Africa* 355; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 43; Spiro *Parent and Child* 404; Van der Vyver and Joubert 223 (but see also the same work at 629 where the view is expressed that the child ought to be obliged to support his father).

155 Constitution s 9.

156 See also Cockrell *Bill of Rights Compendium* par 3E24; Heaton and Kruger *Family Law* 310; Heaton *Bill of Rights Compendium* par 3C47; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 422; Robinson in Atkin (ed.) 2007 *International Survey of Family Law* 283; Davel 2004 *De Jure* 381 387.

157 On surrogate motherhood, see above in this chapter.

158 S 19(1) read with s 19(3).

159 S 17.

160 S 19(2). An unmarried minor mother and/or an unmarried father can acquire guardianship in terms of ss 22 or 24 of the Act. An unmarried father can also acquire guardianship in terms of s 21. Ss 21, 22 and 24 are discussed below in this chapter.

161 S 313 read with Schedule 4.

162 S 21. On s 21, see below in this chapter.

compelling both parents to shoulder the responsibilities of parenthood, rather than leaving these responsibilities up to mothers, is what substantive sex and gender equality, the child's best interests, and the child's right to parental care demand. Those who oppose automatic responsibilities and rights for unmarried fathers argue that, since unmarried mothers are still predominantly the primary caretakers of their children, their primary responsibility for childcare justifies exclusion of unmarried fathers from automatic rights in respect of their children. Another argument in favour of exclusion of unmarried fathers from automatic rights is that, because of the economic inequality of the sexes, the unmarried mother should not be compelled to go to court to challenge the unmarried father's rights in respect of his child.[163]

(b) Automatic parental responsibilities and rights for certain unmarried fathers

In terms of section 21(1)*(a)* of the Children's Act, an unmarried biological father acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life partnership when the child is born.[164]

In terms of section 21(1)*(b)*, he can acquire full parental responsibilities and rights regardless of whether he ever lived with the mother, provided that he

(1) consents or successfully applies to be identified as the child's father[165] or pays damages in terms of customary law;[166]

(2) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period;

(3) contributes or has attempted in good faith to contribute towards expenses relating to the child's maintenance for a reasonable period.[167]

It is unclear whether the three requirements in section 21(1)*(b)* are cumulative or independent. In *RRS v DAL*,[168] it was held that all three requirements must be satisfied. This is in keeping with the view of several authors.[169] However, in *I v C*[170] concern was raised about the

163 On the constitutional implications of the legal position of unmarried parents, see e.g. Clark and Goldblatt in Bonthuys and Albertyn (eds) *Gender, Law and Justice* 228–232; Kaganas in Murray (ed.) *Gender and the New South African Legal Order* 173–174; Sinclair assisted by Heaton *Law of Marriage* 118–126; South African Law Commission *Report on the Review of the Child Care Act* par 8.5.2.1; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 391–394 fn 205, 417; Clark 1992 *SAJHR* 568; Sonnekus and Van Westing 1992 *TSAR* 240 fn 50; Goldberg 1993 *SALJ* 270; Hutchings 1993 *THRHR* 315; Labuschagne 1993 *THRHR* 417–419, 428; Mosikatsana 1996 *ASSAL* 183; Kruger 1996 *THRHR* 521–522; Pantazis 1996 *SALJ* 11–19; Labuschagne 1996 *THRHR* 181; Goldberg 1996 *THRHR* 282; Schwellnus 1996 *Obiter* 153; Wolhuter 1997 *Stell LR* 65; Labuschagne 1997 *THRHR* 555; Robinson 1999 *De Jure* 281–282; Boshoff 1999 *TSAR* 283–284; Pieterse 2000 *Stell LR* 326–328; Louw 2010 (3) *PELJ* 156; Morei 2011 (2) *Speculum Juris* 81; Louw 2016 *De Jure* 193. Many of these authors deal with the position prior to the coming into operation of s 21 of the Children's Act, but several of the points they make remain pertinent.

164 S 21(1)(*a*). The Act does not define the phrase "permanent life partnership". The phrase presumably refers to a life partnership that falls outside the ambit of the Civil Union Act. When such a life partnership can be said to be permanent is, of course, an issue that does not admit of a ready answer. See further Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-13, 3-15; Louw 2016 *De Jure* 201.

165 The application to be identified as the child's father is governed by s 26 of the Children's Act.

166 The payment of damages in terms of customary law probably refers to delivery of cattle or payment of another form of damages for the mother's seduction or pregnancy. It is unclear whether it also covers delivery of *isondlo* (i.e., delivery of an animal by a father to the person who raised his child). See also Heaton and Kruger *Family Law* 313 fn 106; Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-14.

167 S 21(1)(*b*). For a detailed discussion of case law on the three requirements, see Louw 2016 *De Jure* 193.

168 Unreported, WCC case no 22994/2010, 10 December 2010.

169 Louw *Acquisition of Parental Responsibilities and Rights* 123–124; Schäfer *Child Law* 241; Skelton and Carnelley (eds) *Family Law* 247; Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-13.

170 Unreported, KZDHC case no 11137/2013, 4 April 2014.

interpretation that renders the three requirements cumulative, *inter alia* because it excludes unmarried fathers who are poor but nevertheless contribute or make good faith attempts to contribute to their children's upbringing. The court did not have to decide the issue, because it held that, in this case, the father had in any event complied with all three requirements. On appeal, in *KLVC v SDI*,[171] the Supreme Court of Appeal confirmed the latter finding. Consequently it, too, did not decide whether all three requirements have to be satisfied. In *GM v KI*,[172] the High Court subsequently assumed that the requirements are not cumulative, for it held that the father acquired full parental responsibilities and rights when he consented to being identified as the child's father. The court's additional statement that an unmarried father can acquire parental responsibilities and rights by contributing to his child's maintenance also indicates that it does not consider the requirements to be cumulative.

The phrases "contribut[ing] or ... attempt[ing] in good faith to contribute" and "reasonable period" in section 21(1)*(b)* are vague. In *KLVC v SDI* the Supreme Court of Appeal provided guidance on their interpretation. It held that the question of what constitutes "a reasonable period of time" depends on the facts of each case, particularly the child's age and the parties' circumstances and actions. "Contribut[ing]" or "attempt[ing] in good faith to contribute" for "a reasonable period" are

> elastic concepts and permit a range of considerations culminating in a value judgment as to whether what was done could be said to be a contribution or a good faith attempt at contributing to the child's upbringing over a period which, in the circumstances, is reasonable.[173]

The Supreme Court of Appeal further held that the maintenance contribution section 21(1)(*b*) refers to does not imply that the father must have provided maintenance as defined in the Maintenance Act. Any contribution to the maintenance of the child is sufficient.

If an unmarried father qualifies for parental responsibilities and rights in terms of section 21(1), he acquires exactly the same parental responsibilities and rights as the child's mother. The child's parents have no choice but to co-parent, because the law imposes joint parental responsibilities and rights on them.[174] In other words, the father's acquisition of parental responsibilities and rights is automatic.[175] Therefore, even if the child lives with, for instance, his or her grandparents after his or her birth, the father retains parental responsibilities and rights.[176]

The father's acquisition of parental responsibilities and rights in terms of section 21(1) operates regardless of whether the child was born before or after the coming into operation of the Act.[177] The application of section 21(1) to children born before the coming into operation of the Act does not mean that the unmarried father acquired parental responsibilities and rights in respect of the period before the section came into operation. It simply means that even if the child was born before the coming into operation of the Act, his or her unmarried father acquired parental responsibilities and rights when section 21 came into operation, that is, on 1 July 2007.[178]

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171 [2015] 1 All SA 532 (SCA), Heaton *Casebook on the Law of Persons* case **[25]**.
172 2015 (3) SA 62 (GJ).
173 Par [22], quoting the judgment of the court *a quo*.
174 *M v V (Born N)* [2011] JOL 27045 (WCC).
175 *FS v JJ* 2011 (3) SA 126 (SCA), Heaton *Casebook on the Law of Persons* case **[24]**.
176 *Ibid.*
177 S 21(4).
178 *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C). In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) the Supreme Court of Appeal overturned the decision of the court *a quo* without dealing with this *dictum*.

(c) Parental responsibilities and rights agreement

If an unmarried father does not meet the conditions that section 21 sets for his automatic acquisition of full parental responsibilities and rights and he has not yet acquired full or specific parental responsibilities and rights in terms of a court order, he can acquire full or specific parental responsibilities and rights by entering into a parental responsibilities and rights agreement in terms of section 22 with the child's mother or any other person who has parental responsibilities and rights.[179]

A parental responsibilities and rights agreement confers only those parental responsibilities and rights that are set out in the agreement.[180] The agreement cannot confer more responsibilities and rights than the conferrer has at the time of the conclusion of the agreement.[181] In other words, the agreement may deal with fewer parental responsibilities and rights than the conferrer has, but it may not deal with more responsibilities and rights than he or she has. Thus, for example, a 16-year-old unmarried mother may confer contact on the child's father, but, generally, she cannot confer guardianship on him, because her guardian, not she, is the child's guardian.[182] It must furthermore be borne in mind that section 30(3) provides that a co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights Therefore, the parental responsibilities and rights agreement cannot provide, for instance, that a father who has full parental responsibilities and rights waives them and transfers them to the child's mother.[183]

The views and wishes of the child must be given due consideration when a parental responsibilities and rights agreement is being developed, bearing in mind the child's age, maturity and stage of development.[184]

A parental responsibilities and rights agreement must be in the format and must contain the particulars that are prescribed by the regulations under the Act.[185] Even if the agreement meets these requirements, it remains unenforceable unless it is registered with a family advocate or is made an order of court on the parties' application.[186] Unless the agreement deals with guardianship, the High Court, a Regional Court dealing with a divorce matter or the Children's Court within whose area of jurisdiction the child ordinarily resides may make it an order of court.[187] If the agreement relates to guardianship, only the High Court may make it an order of court.[188] Except for the prescription that the High Court must be approached if the agreement deals with guardianship, section 22 does not indicate that different grounds apply for registration of the agreement by the family advocate and making the agreement an order of court. With the exception of cases dealing with guardianship, the parties therefore have a choice as to whether they want to approach the family advocate or the court.

Before registering the agreement or making it an order of court, the family advocate or court must be satisfied that the agreement is in the best interests of the child.[189] The family advocate or court must therefore apply the best interests of the child standard as set out in section 7(1) of the Act.[190]

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179 S 22(1).
180 *Ibid.*
181 S 22(2).
182 In terms of s 19(2), the guardian of an unmarried minor mother is also the guardian of the mother's child unless the child's father has guardianship or a court has conferred guardianship on the mother.
183 On this section, see further below in this chapter.
184 Reg 8(3)(*a*) of the General Regulations Regarding Children, 2010 in GN R261 *GG* 33076 of 1 April 2010.
185 S 22(3) read with the definition of "prescribed" in s 1(1).
186 S 22(4).
187 S 22(4)(*b*) read with s 29(1).
188 S 22(7); *Ex parte Sibisi* 2011 (1) SA 192 (KZP).
189 Ss 22(5) and 29(3).
190 These factors are set out below in this chapter.

Once a parental responsibilities and rights agreement has been registered or made an order of court, it can only be terminated or amended by the family advocate or the court.[191] If the family advocate registered the agreement, he or she may amend or terminate it on application by:

(1) A person who has parental responsibilities and rights in respect of the child.

(2) The child, provided that he or she has the court's consent.

(3) Any other person who is acting in the child's interest and has the court's consent.[192]

If the agreement has been made an order of court, the court may amend or terminate it on application by the same persons who may approach the family advocate.[193] If the agreement relates to guardianship, only the High Court may amend or terminate it.[194]

(d) Assignment of parental responsibilities and rights by a court

An unmarried father can acquire parental responsibilities and rights by means of a court order. Firstly, as upper guardian of all minors, the High Court may confer any or all parental responsibilities and rights on the father.[195] The decisive consideration is the child's best interests. In determining the child's best interests the court must take into account the factors that are listed in section 7(1) of the Children's Act.[196] Due consideration also has to be given to the views of the child if he or she is of an age, maturity and stage of development to be able to participate in the matter.[197]

Secondly, in terms of section 23 of the Children's Act, anyone who has an interest in the child's care, well-being or development may approach the High Court, a Regional Court dealing with a divorce matter, or the Children's Court for an order awarding contact or care to him or her.[198] An unmarried father clearly qualifies as a person who has an interest in his child's care, well-being or development.

The court must take the following factors into account when considering an application in terms of section 23:[199]

(1) The best interests of the child.

(2) The relationship between the applicant and the child, and between any other relevant person and the child.

(3) The degree of commitment the applicant has shown towards the child.

(4) The extent to which the applicant has contributed towards expenses in connection with the child's birth and maintenance.

(5) Any other fact that should, in the opinion of the court, be taken into account.

Either contact or care, or both contact and care can be assigned to the applicant.[200] If the court assigns contact and/or care to a person, it may impose whatever conditions it deems

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191 S 22(6)(*a*).

192 *Ibid.*

193 S 22(6)(*b*).

194 S 22(7).

195 For examples of cases where the court's common-law power as upper guardian to confer (elements of) parental authority (i.e. parental responsibilities and rights) on an unmarried father was invoked prior to the coming into operation of the Children's Act, see *Ex parte Van Dam* 1973 (2) SA 182 (W); *W v S* 1988 (1) SA 475 (N); *B v P* 1991 (4) SA 113 (T); *S v S* 1993 (2) SA 200 (W); *B v S* 1995 (3) SA 571 (A); *Bethell v Bland* 1996 (2) SA 194 (W); *Coetzee v Singh* 1996 (3) SA 153 (D); *V v H* [1996] 3 All SA 579 (SEC); *Krasin v Ogle* [1997] 1 All SA 557 (W); *T v M* 1997 (1) SA 54 (A); *Wicks v Fisher* 1999 (2) SA 504 (N) (also reported as *W v F* 1998 (9) BCLR 1199 (N)); *I v S* 2000 (2) SA 993 (C).

196 These factors are set out below in this chapter.

197 Children's Act s 10.

198 S 23(1). The court within whose area of jurisdiction the child ordinarily resides has jurisdiction to make the order: s 29(1).

199 S 23(2).

200 *CM v NG* [2012] 3 All SA 104 (WCC), 2012 (4) SA 452 (WCC).

necessary.[201] Furthermore, the assignment order does not affect the parental responsibilities and rights another person has in respect of the child.[202] Thus, for example, an unmarried mother does not lose her parental responsibilities and rights or any element of those responsibilities and rights simply because the court assigns contact and/or care to the child's father. However, section 28(2) authorises combining an application for termination, extension, suspension or circumscription of parental responsibilities and rights with an application for the assignment of contact and/or care. Thus, for example, the unmarried father could ask the court to suspend particular aspects of the mother's care and to assign them to him.

Thirdly, a person who has an interest in the child's care, well-being or development may approach the High Court in terms of section 24 for an order assigning guardianship to him or her.[203] When considering the application the court must take the following factors into account:

(1) The best interests of the child.

(2) The relationship between the applicant and the child, and between any other relevant person and the child.

(3) Any other fact that should, in the opinion of the court, be taken into account.[204]

If the child already has a guardian, the person who applies for assignment of guardianship must give reasons why the existing guardian is not suitable to have guardianship.[205] In *CM v NG*,[206] it was held that the latter requirement applies only if the applicant is seeking sole guardianship.

(e) Adoption

A child may be adopted by his or her unmarried biological father.[207] If the father adopts the child, he acquires full parental responsibilities and rights in respect of his child to the exclusion of anybody (including the child's mother) who had parental responsibilities and rights in respect of the child before the adoption order was made, unless the order provides otherwise.[208] Subject to the exceptions imposed by the adoption order, the child is for all purposes regarded as the child of the adoptive parent and *vice versa*.[209] However, the adoption order does not permit any marriage, civil union or sexual intercourse between the child and any person which would have been prohibited had the child not been adopted.[210] Nor does the adoption order affect any rights to property the child acquired before the adoption.[211]

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201 S 23(1).

202 S 23(4).

203 S 24(1) read with *Ex parte Sibisi* 2011 (1) SA 192 (KZP). If the application is made by a non-South African citizen, it must be regarded as an application for inter-country adoption: s 25. On inter-country adoption, see Heaton and Kruger *Family Law* 323–325.

204 S 24(2).

205 S 24(3).

206 [2012] 3 All SA 104 (WCC), 2012 (4) SA 452 (WCC).

207 S 231(1)(*d*). The child's biological father who does not have guardianship is entitled to be notified when the child becomes available for adoption and to be given an opportunity to apply to adopt the child: s 231(7)(*a*).

208 Children's Act s 242(1) and (2)(*a*) and (*b*).

209 S 242(3).

210 S 242(2)(*c*) On the prohibited degrees of relationship, see Heaton and Kruger *Family Law* 26–29, 207, 219.

211 S 242(2)(*d*). On adoption, see further Heaton and Kruger *Family Law* 317–323.

5.6.5 General rules on exercising parental responsibilities and rights

A person need not have all the components of parental responsibilities and rights.[212] Thus one parent may have more parental responsibilities and rights than the other, or one parent may have no parental responsibilities and rights at all.

Regardless of whether a person is the sole holder or a co-holder of parental responsibilities and rights, he or she must apply the standard that the child's best interests are of paramount importance whenever he or she exercises any aspect of parental responsibilities and rights.[213] The best interests standard entails, *inter alia*, that the factors that are listed in section 7(1) of the Act must be taken into account where relevant. These factors are:

(1) The nature of the personal relationship between the child and his or her parents, or any specific parent, and between the child and any other caregiver or relevant person.

(2) The attitude of the parents, or any specific parent, towards the child and the exercise of parental responsibilities or rights in respect of the child.

(3) The capacity of the parents, any specific parent, or any other caregiver or person, to provide for the child's needs, including his or her emotional and intellectual needs.

(4) The likely effect any change in the child's circumstances would have on the child. This includes the likely effect of the child's separation from either parent or both parents, a sibling, another child, or any other caregiver or person with whom the child has been living.

(5) The practical difficulty and expense of the child having contact with his or her parents, or a specific parent, and whether that difficulty or expense would substantially affect the child's right to maintain personal relations and direct contact with that parent on a regular basis.

(6) The child's need to remain in the care of his or her parent, family and extended family, and to maintain a connection with his or her family, extended family, tribe, culture or tradition.

(7) The child's age, maturity, stage of development, gender, background and any other relevant characteristic.

(8) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development.

(9) Any disability the child may have.

(10) Any chronic illness from which the child may suffer.

(11) The child's need to be brought up within a stable family environment or, if this cannot be achieved, in an environment resembling a family environment as closely as possible.

(12) The need to protect the child from any physical or psychological harm which may be caused by subjecting him or her to maltreatment, abuse, neglect, exploitation or degradation, exposing him or her to violence, exploitation or other harmful behaviour, or exposing him or her to maltreatment, abuse, degradation, ill-treatment, violence, or harmful behaviour towards another person.

(13) Any family violence involving the child or a family member of the child.

(14) Which action or decision would avoid or minimise further legal or administrative proceedings regarding the child.

A holder of parental responsibilities and rights must also give effect to section 10 of the Act when exercising any parental responsibility and/or right. In terms of this section, a child who is of such an age, maturity and stage of development as to be able to participate in any

212 S 18(1).

213 Constitution s 28(2); s 9 of the Children's Act.

matter concerning the particular aspect of parental responsibilities and rights, may participate in an appropriate way, and his or her views must be given due consideration.

Furthermore, in terms of section 31(1), due consideration must be given to any views and wishes the child expresses, *before* a holder of parental responsibilities and rights takes any of the following decisions:

(1) A decision in connection with the child's marriage, adoption or removal from South Africa, an application for a passport for the child, or the alienation or encumbrance of the child's immovable property. As is explained below in this chapter, these are the decisions for which the consent of all co-holders of guardianship is required.

(2) A decision in connection with a matter affecting contact between the child and a co-holder of parental responsibilities and rights.

(3) A decision in connection with the appointment of the person's successor as sole guardian or sole holder of care.

(4) A decision which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.[214]

The child's age, maturity and stage of development must be taken into account when consideration is given to the child's wishes and views.

5.6.6 The position if both unmarried parents have parental responsibilities and rights

(a) General

If both unmarried parents have parental responsibilities and rights in respect of their child, they may exercise those responsibilities and rights without each other's consent unless the Children's Act, any other rule of law or a court order provides otherwise.[215] In other words, the starting point is that co-holders may independently exercise their parental responsibilities and rights. Joint consent may, however, be required in terms of an Act, another rule of law, or a court order.

(b) Guardianship

In respect of guardianship, section 18(5) read with section 18(3)(*c*) of the Act specifically requires the consent of all the child's guardians for:

(1) The child's marriage.

(2) The child's adoption.

(3) The child's departure or removal from South Africa.

(4) The child's application for a passport.

(5) The alienation or encumbrance of any immovable property of the child.

The High Court or a Regional Court in a divorce matter may grant exemption from the requirement of joint consent.[216]

(c) Due consideration of the views and wishes of other co-holders

A further limitation on the exercising of common parental responsibilities and rights is found in section 31(2) of the Act. This section provides that a person who holds parental responsibilities and rights must give due consideration to the views and wishes of all

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214 S 31(1)(*a*) read with s 31(1)(*b*)(i), (ii) and (iv); see also s 10. On the overlap between s 31(1) and s 10, and the difficulties in interpreting the words "significant" and "significantly", see Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-32–3-34.

215 Ss 18(4) and (5), 30(2).

216 S 18(4) and (5) read with s 45(3)(*a*), (*d*) and (*g*).

co-holders before taking any decision which is likely to change significantly or to have a significant adverse effect on a co-holder's exercise of parental responsibilities and rights. Once such consideration has been given to the co-holder's views and wishes, the person may, however, act independently.[217] Failing to give consideration to the co-holder's views and wishes does not render the decision void or invalid, but the decision – like any other – can be set aside by the court if it is not in the child's best interests.[218]

(d) Surrender or transfer of parental responsibilities and rights is prohibited

Section 30(3) places another restriction on co-holders' powers. It provides that a co-holder of parental responsibilities and rights may not surrender or transfer his or her parental responsibilities and rights. Co-holders may, however, agree that one of them will exercise any or all of the parental responsibilities and rights on behalf of the other co-holder(s).

In terms of section 30(4), an agreement in which a co-holder authorises somebody to exercise his or her parental responsibilities and rights on his or her behalf does not divest him or her of those responsibilities and rights. He or she remains "competent and liable" to exercise them. Thus, for example, an unmarried father who has parental responsibilities and rights may not waive his parental responsibilities and rights or transfer them to the child's mother, but he may delegate them to her.

(e) Parenting plan

If co-holders of parental responsibilities and rights experience difficulties in exercising those responsibilities and rights, they may approach the court for an appropriate order, but before doing so they must try to agree on a parenting plan in terms of section 33.[219] In preparing their parenting plan, they must seek the assistance of a family advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person.[220] If one or more of the co-holders refuse to engage in discussions about a parenting plan, the court can be approached for an order on the exercising of the particular parental responsibilities and rights. In such event the court may order the unwilling co-holder to enter into a parenting plan with the other co-holder.[221]

Even if co-holders do not experience difficulties in exercising their responsibilities and rights, they may enter into a parenting plan,[222] but then they need not seek the assistance of a family advocate, social worker or psychologist, or mediation by any person.

A parenting plan may determine any matter in connection with parental responsibilities and rights, including where and with whom the child is to live, the child's maintenance, contact between the child and any of the parties or between the child and any other person, and the child's schooling and religious upbringing.[223] A parenting plan must comply with the best interests of the child standard as set out in section 7.[224] Furthermore, the child must be consulted during the development of the plan, bearing in mind his or her age, maturity

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217 *J v J* 2008 (6) SA 30 (C).

218 *Ibid.*

219 S 33(2). See also reg 10(1) of the General Regulations Regarding Children. The Act does not define a parenting plan. From s 33(1) one deduces that a parenting plan is an agreement in which co-holders make arrangements on the way in which they will exercise their respective parental responsibilities and rights: see also *PD v MD* 2013 (1) SA 366 (ECP); Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-37. On the question whether parenting plans serve the best interests of the parent or the child, see Mahlobogwane 2013 *Obiter* 218.

220 S 33(5). On the difficulties relating to when a family advocate, social worker or psychologist can be said to be giving "assistance" in preparing a parenting plan, and the meaning of the phrase "other suitably qualified person", see Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-38.

221 *M v V (Born N)* [2011] JOL 27045 (WCC).

222 S 33(1).

223 S 33(3).

224 S 33(4).

and stage of development. He or she must be granted an opportunity to express his or her views, and those views must be given due consideration.[225]

Section 34 lays down the formal requirements for a parenting plan. It requires that the plan must be in writing and must be signed by the parties.[226] The plan may be registered with a family advocate or made an order of court.[227] Since section 34 does not indicate that there are different grounds for registration by the family advocate and the making of a court order, the parties have a choice as to whether to approach the family advocate or the court.[228]

A parenting plan that was registered with a family advocate may subsequently be amended or terminated by the family advocate upon application by the co-holders who are the parties to the plan.[229] A parenting plan that was made an order of court may only be amended or terminated by a further order of court. Three categories of persons may approach the court for amendment or termination, namely:

(1) The co-holders who are the parties to the parenting plan.[230]

(2) The child in respect of whom the parties to the parenting plan have parental responsibilities and rights, provided that the child has the court's consent.

(3) Any other person who is acting in the child's interest and has the court's consent.[231]

5.6.7 Succession

(a) Intestate succession

In terms of section 1(2) of the Intestate Succession Act 81 of 1987, the fact that a child was born of unmarried parents does not affect the capacity of one blood relation to inherit the intestate estate of another. This means that children who are born of unmarried parents can inherit intestate from both parents (and more distant blood relations) and that both parents (and more distant blood relations) can inherit intestate from the children.

(b) Testate succession

Section 2D(1)(*b*) of the Wills Act 7 of 1953[232] provides that, for the purpose of interpreting a will, the fact that a child was born of unmarried parents is irrelevant when determining a person's relationship to the testator or any other person. Therefore, for example, a reference in a will to "my children" includes children the testator had as a married and an unmarried person.

5.7 Changing the status of a child born of unmarried parents

5.7.1 Introduction

There are two, or possibly three, ways in which a child born of unmarried parents can acquire the status of a child born of married parents. These ways were previously referred to

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225 Reg 11(1).
226 S 34(1)(*a*).
227 S 34(1)(*b*).
228 See also Heaton in Davel and Skelton (eds) *Commentary on the Children's Act* 3-39; Skelton in Boezaart (ed.) *Child Law in South Africa* 91.
229 S 34(4).
230 In *PD v MD* 2013 (1) SA 366 (ECP) the respondent argued that the phrase "by the co-holders of parental responsibilities and rights who are parties to the plan" means that the co-holders are required jointly to approach the court for amendment of the parenting plan. The court rejected this argument and held that a co-holder of parental responsibilities and rights is entitled to apply to court for an amendment of the terms of a parenting plan that has been made an order of court, provided that he or she made a reasonable effort to reach agreement with the other co-holder(s) before approaching the court: par [29].
231 S 34(5).
232 Which was inserted by the Law of Succession Amendment Act 43 of 1992.

as ways of "legitimating" the child. As is pointed out above in this chapter, the Children's Act moved away from the terms "legitimate" and "illegitimate". It is therefore no longer appropriate to refer to "legitimating" a child.

5.7.2 A subsequent marriage or civil union between the child's parents

In terms of section 38 of the Children's Act, a child born of parents who marry each other after the child's birth must for all purposes be regarded as a child born of parents who were married to each other at the time of the child's birth.[233] The same applies if the child's parents enter into a civil union with each other after the child's birth.[234] This means that if the child's parents marry each other or enter into a civil union with each other after the child's birth, the child's father retroactively acquires full parental responsibilities and rights alongside the child's mother, because the child's parents are deemed to have been married at the time of the birth. This is the position even if the child's parents could not have legally married each other or could not legally have entered into a civil union at the time of the child's conception or birth.[235] It is also the position if the subsequent union between the parents is a putative marriage.[236]

If a child's mother marries someone other than the child's father or enters into a civil union with somebody other than the child's father, the child does not become a child born of married parents and the marriage or civil union does not confer any parental responsibilities and rights on the mother's husband or civil union partner.[237]

5.7.3 Adoption

When a child is adopted, the adoption terminates the parental responsibilities and rights of the child's existing parents and confers full parental responsibilities and rights on the adoptive parent(s).[238] Therefore, if a child born of unmarried parents is adopted by married adoptive parents, his or her status will change to a child born of married parents.

5.7.4 An order of the authorities

At common law a child could be "legitimated" by an order of the Sovereign. This was called *legitimatio per rescriptum principis*. The Sovereign normally gave such an order as a special favour, especially in cases where one of the parents of the child had died and the child could not be "legitimated" by his or her parents' subsequent marriage. In *Potgieter v Bellingan*[239] it was held that *legitimatio per rescriptum principis* was unknown in South Africa and had become obsolete.

The court is not vested with a general power to change the status of a child born of unmarried parents to that of a child born of married parents.[240] It does have the power to make a declaratory order in respect of the status of a child born of a putative marriage, but in this situation it simply confirms an existing fact, because a child who is born of a putative marriage is in any event treated as a child born of married parents.[241]

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233 Children's Act s 38(1); see also s 11(1) of the Births and Deaths Registration Act. On registration of the child's birth, see further ch 2 above.

234 In terms of s 13 of the Civil Union Act, the consequences of a civil union correspond to those of a civil marriage, and a civil union is covered by the term "marriage" except in so far as the Marriage Act and the Recognition of Customary Marriages Act are concerned.

235 Children's Act s 38(2).

236 *Makholiso v Makholiso* 1997 (4) SA 509 (Tk); see also fn 2 above in this chapter.

237 See also Boezaart *Persons* 98; Heaton and Kruger *Family Law* 312. In respect of the position prior to the coming into operation of the Children's Act, see *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) where it was held that the mother's husband does not acquire guardianship in respect of her child.

238 Children's Act s 242(2)(*a*).

239 1940 EDL 264, Heaton *Casebook on the Law of Persons* case **[26]**.

240 *W v S* 1988 (1) SA 475 (N).

241 On putative marriages, see Heaton and Kruger *Family Law* ch 4.

6

MINORITY

6.1 Introduction

Minority is one of the most important factors influencing a person's status. The legal view is that, because people's juristic acts are dependent on their expression of will, only persons who have a reasonable understanding and judgement should have capacity to act. In other words, the law confers capacity to enter into juristic acts only on persons who can understand the nature, purport and consequences of their acts, since such acts may have far-reaching consequences for their authors: for example, they may result in the creation or loss of rights and duties. Obviously, youth has a major influence on a person's powers of judgement. For this reason the law protects young people by limiting their capacity to participate in legal interaction. From a legal point of view, the starting point is that a person has neither the intellectual ability nor the experience to participate independently in legal and commercial dealings before reaching the age of 18 years. The restrictions on a minor's[1] capacity do not violate the constitutional right to equality, because their objective is the minor's protection.[2]

Generally speaking, a person acquires full capacity to participate in legal interaction on his or her 18th birthday.[3] However, several earlier ages are of legal importance. For example: children below the age of seven (that is, *infantes*) have no capacity to act, while minors between the ages of seven and 18 years have limited capacity to act, which means that they can, as a rule, only enter into contracts with the assistance of their guardian. Once children have turned 12 years of age, they may independently buy condoms and receive free condoms on request, and they may be provided with other contraceptives if they request this, receive proper medical advice, and undergo a medical examination to determine whether there are any medical reasons why a specific contraceptive should not be provided.[4] As from the age of 14 years minors may witness a will,[5] and once they have turned 16, they may make a will.[6] These examples and the other rules on minors' capacity are set out in more detail below in this chapter.

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1 For lack of a better word, "minor" is used to denote a person between seven and 18 years of age although, strictly speaking, the term includes a person under the age of seven years. On the preference for the word "minor", see further Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 755 fn 39.

2 The right to equality is protected by s 9 of the Constitution of the Republic of South Africa, 1996; see also Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 6 read with the "prohibited grounds" in s 1(1), which *inter alia* prohibit unfair discrimination on the ground of age.

3 Children's Act 38 of 2005 s 17.

4 Children's Act s 134(1) and (2).

5 Wills Act 7 of 1953 s 1.

6 Wills Act s 4.

6.2 Children's rights

6.2.1 Constitution of the Republic of South Africa, 1996

Although minors can invoke the rights that the Constitution of the Republic of South Africa, 1996 confers on everyone, they are also afforded special protection by section 28 of the Constitution. The purpose of section 28, which is commonly known as the children's rights clause, is to protect children, not their parents. Thus it affords rights to children, not their parents.[7]

Section 28(1) of the Constitution gives every child the right:

(1) To a name and nationality from birth.

(2) To family or parental care, or appropriate alternative care when removed from the family environment.

(3) To basic nutrition, shelter, basic health care and social services.

(4) To be protected from maltreatment, neglect, abuse and degradation.

(5) To be protected from exploitative labour practices.

(6) Not to be required or permitted to perform work or provide services that are inappropriate for someone of his or her age, or place his or her well-being, education, physical or mental health, or spiritual, moral or social development at risk.

(7) Not to be detained except as a measure of last resort. If detained, the child has all the rights which sections 12 and 35 of the Constitution afford all detainees. In addition, the child may only be detained for the shortest possible period and has the right to be kept separately from detained adults and to be treated in a manner and kept in conditions that take account of his or her age.

(8) To have a legal practitioner assigned to him or her by the state in civil proceedings, at state expense, if substantial injustice would otherwise result.

(9) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

Section 28(2) of the Constitution moreover provides that a child's best interests are of paramount importance in every matter concerning the child. Consequently, the best interests of the child must be central in all fields of the law.[8]

6.2.2 Children's Act 38 of 2005

The rights that a child has in terms of the Children's Act supplement those that the Constitution confers on every child.[9] The Act *inter alia* seeks to give effect to the child's constitutional rights to family or parental care or appropriate alternative care when removed from the family environment, to social services, to be protected from maltreatment, neglect, abuse or degradation, and to have paramountcy afforded to his or her best interests in every matter concerning him or her.[10] The Act also seeks to give effect to the obligations concerning the well-being of children which South Africa has incurred in terms of international instruments such as the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child.[11]

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7 *SW v F* 1997 (1) SA 796 (O). This case was decided in the context of the children's rights clause in the interim Constitution (Constitution of the Republic of South Africa 200 of 1993 s 30), but it is submitted that the principle holds good in respect of the children's rights clause in the final Constitution, too. See also *M v S (Centre for Child Law* Amicus Curiae) 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)).

8 On children's rights, see further Heaton and Kruger *Family Law* ch 22 and the sources cited there.

9 Children's Act s 6(2)(*a*) read with s 8(1).

10 S 2(*b*); compare s 28(1)(*b*), (*d*) and (2) of the Constitution.

11 S 2(*b*). On these international instruments, see further below in this chapter. South Africa also incurred obligations in respect of disabled children when it ratified the Convention on the Rights of Persons with

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Section 6 of the Act sets out general principles which must guide the implementation of legislation and guide proceedings, actions and decisions by organs of state relating to a specific child or children in general.[12] Included among these is the principle that – subject to lawful limitation – all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the rights the child has in terms of the Bill of Rights, the best interests of the child standard that is set out in section 7 of the Children's Act, and the rights and principles that are contained in the Children's Act.[13] In addition, section 9 of the Act requires that the standard that the child's best interest is of paramount importance must be applied in all matters concerning a child's care, protection and well-being.

Other general principles section 6 sets out are that all proceedings, actions or decisions in a matter concerning a child must respect the child's dignity, treat him or her fairly and equitably, protect him or her from unfair discrimination on any ground (including his or her own health status or that of a family member), and recognise his or her need for development and to engage in play and other recreational activities appropriate to his or her age.[14] If the child is disabled, his or her disability must be recognised and an enabling environment must be created to respond to the child's special needs.[15] Furthermore, section 11 lists specific issues which must be considered in respect of children with disabilities or chronic illnesses.

Section 6 also provides that, having regard to his or her age, maturity and stage of development, the child must be informed of any action or decision in a matter which significantly affects him or her,[16] and, if it is in the child's best interests, his or her family must be given an opportunity to express their views in any matter concerning the child.[17] In addition, section 10 affords every child who is of such an age, maturity and stage of development as to be able to participate in a matter concerning him or her, the right to participate in that matter in an appropriate way. Due consideration must be given to the child's views. Section 6 further requires that an approach which is conducive to conciliation and problem solving must be adopted in any matter that concerns a child, and that a confrontational approach must be avoided. A delay in any action or decision regarding the child must be avoided as far as possible.[18]

Section 12 affords every child the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.[19] The section specifically provides that children below the minimum legal age for marriage may not marry or get engaged at all.[20] Once they reach the minimum marriageable age they may not be given out in marriage or engagement without their consent.[21] The section further prohibits female circumcision and genital mutilation, and virginity testing of children below the age of

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Disabilities in 2007. For instance, art 7(1) of the Convention obliges states parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. In terms of art 7(2), the best interests of the child "shall be a primary consideration" in all actions concerning disabled children. Disabled children also have the right freely to express their views on all matters affecting them. Their views must be given due weight in accordance with their age and maturity, on an equal basis with other children. They must also be provided with "disability and age-appropriate assistance" to realise this right: art 7(3). On the Convention, see also chs 7 and 8 below. See further Boezaart 2011 *THRHR* 265; Boezaart 2012 *SAPL* 454; Elphick, Elphick and De Sas Kropiwnicki 2014 *SAJHR* 221.

12 S 6(1).
13 S 6(2)(*a*).
14 S 6(2)(*b*)–(*e*).
15 S 6(2)(*f*).
16 S 6(5).
17 S 6(3).
18 S 6(4). See also *FS v JJ* 2011 (3) SA 126 (SCA), Heaton *Casebook on the Law of Persons* case **[24]**.
19 S 12(1).
20 S 12(2)(*a*).
21 S 12(2)(*b*). A minor's capacity to marry is discussed below in this chapter.

16 years.[22] A virginity test may be performed on a child who is over the age of 16 years only if it is done in the manner that is prescribed by the regulations under the Act, and the child has consented in the prescribed manner and has received proper counselling.[23] A male child who is below the age of 16 years may not be circumcised unless the circumcision is performed for medical reasons on the recommendation of a medical practitioner or for religious purposes in accordance with the practices of the particular religion (for example, the Jewish faith).[24] Taking into consideration his age, maturity and stage of development, every male child has the right to refuse circumcision.[25] If the child has already turned 16, he may be circumcised only if the circumcision is performed in the manner that is prescribed by the regulations, and he has given consent in the prescribed manner and has received proper counselling.[26]

Section 13 entitles every child to access to information on health promotion, the prevention and treatment of ill-health and disease, sexuality, reproduction, his or her health status and the causes and treatment of his or her health status. It also affords the child the right to confidentiality regarding his or her health status and the health status of his or her parent, care-giver or family member, unless maintaining such confidentiality is not in the child's best interests.[27] The health information that is provided must be relevant and must be in a format that is accessible to children. In providing the information, due consideration must be given to the needs of disabled children.[28]

Even though the Constitution confers a right of access to court on everyone[29] and the common law regulates the minor's capacity to litigate,[30] section 14 of the Children's Act specifically empowers every child to bring a matter to court and to be assisted in bringing a matter to court. The first part of the section, which empowers every child to bring a matter to court, re-affirms the constitutional right of access to court and relates it specifically to children.[31] This part of the section ensures that every child has access to court either directly (for example, when the minor's guardian institutes litigation on behalf of the minor or assists the minor in litigation) or indirectly (for example, when the court appoints a *curator ad litem* or legal representative for the minor).[32] As section 14 does not prescribe the manner in which the minor must bring a matter to court or the way in which he or she must be assisted in bringing the matter to court, the court must decide these matters by

22 S 12(3) and (4); see also s 8(*b*) of the Promotion of Equality and Prevention of Unfair Discrimination Act.
23 S 12(5).
24 S 12(8).
25 S 12(10).
26 S 12(9). On genital mutilation, virginity tests and circumcision, see further Davel in Davel and Skelton (eds) *Commentary on the Children's Act* 2-22–2-24; Kassan and Mahery in Boezaart (ed.) *Child Law in South Africa* 186–194; Mahery, Proudlock and Jamieson *Guide to the Children's Act* 7–8; Ngidi in Boezaart (ed.) *Child Law in South Africa* 237–240; Schäfer *Child Law* 166–167, 169–173; Schäfer in Clark (ed.) *Family Law Service* pars E214–E217; Moodley 2008 *SAPL* 65; Bennett, Mills and Munnick 2010 *TSAR* 254; Vawda and Maqutu June 2011 *SAJBL* 36; Smith, Velaphi, Horn, Joolay and Madide 2011 *SAMJ* 50; Ncube and Ross Dec 2012 *SAJBL* 67; Sonnekus 2012 *TSAR* 758; Sloth-Nielsen 2012 *Law, Democracy and Development* 69; McQuoid-Mason 2013 *SAMJ* 283; Millard and Goldstuck 2013 *SAMJ* 436; Strode 2016 *SAMJ* 1173; Couzens 2017 *SALJ* 116. Circumcision of males frequently forms part of customary initiation. Because customary initiation has been subject to abuse, especially at initiation schools, the Department of Traditional Affairs has drafted the Customary Initiation Bill, 2017 which seeks to regulate all aspects of customary initiation of males and females, including initiation schools. The draft Bill was published for comment in General Notice 528 *GG* 40978 of 14 July 2017.
27 S 13(1). On access to a minor's medical records, see Pienaar 2014 *SAJHR* 508.
28 S 13(2).
29 Constitution s 34.
30 See below in this chapter.
31 On the implications of the use of the word "every" in respect of a minor's right to be assisted in bringing a matter to court, see below in this chapter.
32 Barratt in Barratt (ed.) *Persons and the Family* 71; Boezaart *Persons* 58–59. On the role of a *curator ad litem* in affording a child access to court, see Boezaart 2013 *De Jure* 707.

applying the standard of the best interests of the child.[33] In *FB v MB*[34] the court held that it would refuse a minor's request to be assisted by his or her own legal representative in terms of section 14 in exceptional circumstances only, particularly if the minor is a party to legal proceedings. In this case, the minor's parent was prepared to pay for the minor's legal representation. In the absence of a financial benefactor, the minor would only be able to obtain legal representation in terms of section 28(1)(*h*) of the Constitution, in which event it would have to be shown that substantial injustice would result if the minor were unrepresented.[35]

Section 15 lists the persons who may approach the court to enforce the rights that are conferred by the Bill of Rights and the Children's Act. They are:

(1) A child who is affected by or involved in the matter to be adjudicated.

(2) Anyone acting in the child's interest or on behalf of another person who cannot act in his or her own name.

(3) Anyone acting as a member of, or in the interest of a group or class of persons.

(4) Anyone acting in the public interest.[36]

Apart from conferring rights on children, the Children's Act provides that every child has responsibilities appropriate to his or her age and ability towards his or her family, community and the state.[37]

6.2.3 United Nations Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

South Africa ratified the United Nations Convention on the Rights of the Child in 1995 and the African Charter on the Rights and Welfare of the Child in 2000. Many of the provisions of the Children's Act embody the obligations South Africa has incurred by ratifying these international instruments. Thus, for example, the provision that every child has responsibilities appropriate to his or her age and ability towards his or her family, community and the state was included in the Children's Act on the strength of the African Charter on the Rights and Welfare of the Child and "the need to Africanise the new children's statute".[38] Other noteworthy provisions include the stipulation in the Charter that the best interests of the child must be "the primary" consideration in all actions concerning the child[39] and the stipulation in the Convention that the best interests of the child must be "a primary" consideration in all actions concerning the child.[40] The Charter further provides that every child must be given an opportunity to express his or her views in all judicial and administrative proceedings which affect him or her and to have those views taken into consideration in accordance with the provisions of the law,[41] while the Convention provides that children who are capable of forming their own views must be given the right to express those views

33 *FB v MB* 2012 (2) SA 394 (GSJ).

34 *Ibid.*

35 The statutory entitlement to assistance in legal proceedings which s 14 confers on every child is broader in scope than that which is conferred by s 28(1)(*h*) of the Constitution, because it does not limit the child's right to legal representation to cases where substantial injustice would otherwise result or restrict the child to a legal practitioner assigned by the state: *FB v MB* 2012 (2) SA 394 (GSJ). On s 28(1)(*h*) of the Constitution, see above in this chapter; see further Heaton and Kruger *Family Law* 291–293 and the sources cited there. On s 14 and the difficulties it creates as well as the benefits it offers, see below in this chapter; see further Davel in Davel and Skelton (eds) *Commentary on the Children's Act* 2-25–2-32; Kruger and Skelton (eds) *Persons* 113–114, 136; Schäfer *Child Law* 173–174; Boezaart and De Bruin 2011 *De Jure* 416.

36 S 15(2). The list resembles the one in s 38 of the Constitution.

37 S 16.

38 South African Law Commission *Discussion Paper Review of the Child Care Act* par 5.4.

39 Art 4(1).

40 Art 3(1).

41 Art 4(2).

freely in all matters that affect them, and that those views must be given due weight, taking the child's age and maturity into account.[42] These provisions are echoed in sections 6, 10 and 31 of the Children's Act.[43]

6.3 The legal status of an *infans*

In view of the considerable difference in status between an *infans* (that is, a child below the age of seven years) and a minor (that is, a child between the ages of seven and 18 years),[44] the legal status of these persons are dealt with separately, that of the *infans* being covered first.

6.3.1 Capacity to act

An *infans* has no capacity to act and cannot conclude any juristic act. This is so, not because the law denies the existence of an *infans*' ability to form a will, but rather because the law attaches no consequences to his or her expression of will.[45] Even if there is in fact agreement between an *infans* and another party, this is ignored by the law. Anything that is transferred to an *infans* in terms of an agreement between the *infans* and a third party can be reclaimed with an enrichment action.[46]

However, an *infans*' act may constitute a juristic fact, giving rise to legal consequences. For example, if an *infans* destroys somebody's property, the juristic fact is that the owner's right of ownership to that property ceases, but this still does not change the *infans*' act into a juristic act.[47]

An *infans* cannot conclude a juristic act even with the assistance of his or her guardian;[48] the guardian has to act for the *infans* and on the *infans*' behalf.[49] An *infans* cannot even accept a donation. The court, the Master of the High Court, or the *infans*' guardian must accept the donation on the *infans*' behalf. Even if it is the *infans*' guardian who is the donor, the guardian has to accept the donation on the *infans*' behalf, and it has to be made clear that the donation is being accepted on the *infans*' behalf.[50]

Once the guardian has entered into a contract on the *infans*' behalf, it is on the *infans* that rights are conferred and duties imposed, and not on the guardian, because the *infans* has legal capacity and can thus have rights, duties and capacities.[51]

Certain transactions cannot be concluded by the guardian on the *infans*' behalf at all, for instance an engagement or a marriage.[52] A guardian may conclude an insurance contract on the *infans*' life, but the benefits that may be paid in terms of the insurance policy are limited by statute.[53]

In practice *infantes* do enter into contracts, such as buying toys and sweets. Strictly speaking all such transactions are void. However, it is unlikely that a court would entertain a case

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42 Art 12.

43 On the Convention and the Charter, see further Heaton and Kruger *Family Law* 296–297 and the sources cited there.

44 On the use of the term "minor" to signify a child between the ages of seven and 18 years, see fn 1 above.

45 This also applies to a mentally ill person: see ch 7 below.

46 Voet 12.6.11.

47 On the meaning of "juristic act" and the distinction between a juristic act and a juristic fact, see Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 69–70 fn 16, 746 fn 6 and 751 fn 25.

48 In this chapter the term "guardian" is generally used to signify the minor's natural guardian (i.e. his or her parent) as well as a legal guardian that is appointed to a minor. On the appointment of guardians, see ch 5 above and Heaton and Kruger *Family Law* ch 24.

49 Voet 26.8.9, 41.2.6; Van Leeuwen *Rooms-Hollands-Regt* 4.2.2.

50 *Buttar v Ault* 1950 (4) SA 229 (T); *Ex parte Hulton* 1954 (1) SA 460 (C).

51 Voet 26.9.2. On the meaning of "legal capacity", see ch 3 above.

52 Children's Act s 12(2)(*a*).

53 Long-term Insurance Act 52 of 1998 s 55. The limit differs depending on whether the child is below or over the age of six years. On minors and insurance contracts, see further Van Niekerk 2006 *SA Merc LJ* 204.

about such a contract, as the maxim *de minimis non curat lex* (that is, the law is not concerned with trivialities) would be applied.

An *infans* may also be liable on the ground of unjustified enrichment or *negotiorum gestio*, because these forms of liability are not based on capacity to act.[54]

6.3.2 Capacity to litigate

In terms of the common law, an *infans* does not have *locus standi in iudicio* and cannot be a party to a lawsuit even if he or she is assisted by his or her guardian. The guardian must always litigate for the *infans* and on the *infans*' behalf.[55] The litigation is brought or defended in the name of the guardian in his or her capacity as guardian.

Whether the common-law position still applies is not entirely clear. Section 14 of the Children's Act provides that "every child" has the right to be assisted in bringing a matter to court. It is arguable that the word "every" amends the common law by conferring limited capacity to litigate on an *infans* and entitling him or her to assistance which will supplement his or her limited capacity to litigate. It is unlikely that this is what the legislature had in mind, for such an interpretation would have the extraordinary result that an *infans* would be able to litigate with his or her guardian's assistance, while being unable to enter into even the most basic contract with his or her guardian's assistance – which could surely not be in the best interests of the child. Consequently it is submitted that section 14 should not be interpreted as constituting a legislative abolition of the firmly established common-law principle that an *infans* does not have capacity to litigate.[56]

6.3.3 Capacity to incur delictual and criminal liability

Since an *infans* is completely unaccountable in law, he or she can never be criminally liable.[57] Nor can an *infans* be delictually liable where liability is based on fault.[58] An *infans* may, however, be liable for delicts that are not based on fault. Thus an *infans* may be sued under the *actio de pauperie* if he or she is the owner of a domestic animal (such as a dog or a goat) that has caused damage, and may incur vicarious liability if his or her employee commits a delict in the execution of the employee's duties.[59]

If the *infans*' guardian uses the *infans* as his or her agent or instrument or negligently fails to prevent the *infans* from causing damage, the guardian may be held personally liable for damage the *infans* causes.[60]

6.4 The legal status of a minor

6.4.1 Capacity to act

Minors between the ages of seven and 18 years have limited capacity to act. The influence this has on a minor's capacity to enter into specific juristic acts is dealt with immediately below.[61]

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54 Grotius 3.30.3; Voet 26.8.2; Van der Keessel *Praelectiones* 3.30.3.

55 Voet 2.4.4.

56 See also Barratt in Barratt (ed.) *Persons and the Family* 71; Boezaart *Persons* 58; Boezaart in Boezaart (ed.) *Child Law in South Africa* 22; Schäfer *Child Law* 203; Boezaart and De Bruin 2011 *De Jure* 420–422, 437, 438. On s 14, see further above in this chapter.

57 Child Justice Act 75 of 2008 s 7(1) and (3).

58 See e.g. *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 (2) SA 642 (A); *Jones v Santam Bpk* 1965 (2) SA 542 (A); *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A); *Roxa v Mtshayi* 1975 (3) SA 761 (A).

59 Cronjé *LAWSA* vol 20 part 1 *Persons* par 466; Donaldson *Minors* 90; Hahlo and Kahn *South Africa* 378; Keightley in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 893; Schäfer in Clark (ed.) *Family Law Service* par E64; Spiro *Parent and Child* 179; *Wille's Principles* 177.

60 See e.g. *Wessels v Ten Oven* 1938 TPD 26; *De Beer v Sergeant* 1976 (1) SA 246 (T); *Maylett v Du Toit* 1989 (1) SA 90 (T); *Godfrey v Campbell* 1997 (1) SA 570 (C).

61 On the issue of whether a minor is "a person not having capacity to contract" for purposes of s 5(3) of the Bills of Exchange Act 34 of 1964, see Heaton and Pretorius 2007 *SALJ* 112.

(a) Contracts

(i) *General*

Generally, a minor can incur contractual liability only if he or she is assisted by his or her guardian when the contract is concluded.[62] A minor may, however, enter into an unassisted contract if the contract improves his or her position without imposing duties on him or her.[63] In other words, the guardian's consent is unnecessary if the minor enters into a contract in terms of which the other party incurs duties while the minor acquires rights only. Thus, for example, a minor may accept a donation without assistance or enter into an agreement that releases him or her from a debt as long as the agreement does not impose any obligation on him or her.[64]

If a minor enters into an unassisted contract which imposes duties on him or her, he or she is not contractually liable.[65] On the minor's side the contract creates a natural obligation (*naturalis obligatio*), which is unenforceable against him or her and his or her guardian.[66] The contract is not void,[67] because from the side of the other party[68] the obligation is a civil one (*civilis obligatio*), which is enforceable against that party.[69] One can therefore say that a minor's unassisted contract is partially valid in the sense of being enforceable at the option of the minor or his or her guardian. Stating that the contract is enforceable at the option of the minor does not mean that the contract is voidable, because a voidable contract is valid until set aside, while a minor's unassisted contract does not bind the minor at all and, in that sense, is not valid as against the minor.[70] It is unclear whether this is also the position if the unassisted contract falls within the ambit of the Consumer Protection Act 68 of 2008.[71]

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62 Voet 26.8.2–26.8.4; Van Leeuwen *Censura Forensis* 1.1.17.10, 1.4.3.2, *Rooms-Hollands-Regt* 1.16.8, 4.2.3; Van der Linden 1.4.1; Grotius 1.8.5, 3.1.26, 3.6.9, 3.48.10; Van der Keessel *Theses Selectae* 128. The courts have also often confirmed this principle: see e.g. *Dhanabakium v Subramanian* 1943 AD 160 and *Edelstein v Edelstein* 1952 (3) SA 1 (A).

63 Voet 26.8.2; Grotius 1.8.5; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8, 4.2.3; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

64 See e.g. Barratt in Barratt (ed.) *Persons and the Family* 41; Boezaart *Persons* 61; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 785 fn 78; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 847; Schäfer *Child Law* 201; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 737. A minor's capacity to enter into other agreements is discussed below in this chapter. On donations by a parent to his or her child, see Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 732 *et seq.*

65 Strictly speaking it is incorrect to say that the minor is not *bound* by the agreement: see e.g. Grotius 3.6.9 and De Wet and Van Wyk 59–60. There is, after all, an obligation in terms of which the minor must perform, although the minor cannot be held liable in court on the strength of this obligation. Therefore it is more accurate to say that the minor is bound but not liable. In South African legal terminology "bound" and "liable" (*gebonde* and *aanspreeklik*) are, however, used more or less as synonyms and this practice is followed in this book. See also Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 800 fn 131; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469 fn 7.

66 Voet 15.1.11, 26.8.4, 44.7.3; Van Leeuwen *Censura Forensis* 1.4.3.2; *McCallum v Hallen* 1916 EDL 74; *Mazzur v Cleghorn & Harris Ltd* 1917 CPD 291; *Marshall v National Wool Industries Ltd* 1924 OPD 238, Heaton *Casebook on the Law of Persons* case **[28]**.

67 But see e.g. *De Beer v Estate De Beer* 1916 CPD 125; *McCallum v Hallen* 1916 EDL 74; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C), Heaton *Casebook on the Law of Persons* case **[40]** in which judges described the contract as void.

68 For purposes of this discussion it is assumed that the other party is a major.

69 Grotius 3.6.9; Voet 26.8.3; Van Leeuwen *Censura Forensis* 1.1.17.10; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

70 But see *Du Toit v Lotriet* 1918 OPD 99 where the contract was described as voidable. Further on the difficulty in correctly describing the nature of a minor's unassisted contract, see Barratt in Barratt (ed.) *Persons and the Family* 45; Boezaart *Persons* 72–73; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 830 *et seq*; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 33–34; Kruger and Skelton (eds) *Persons* 122; Schäfer *Child Law* 200–201; Van der Vyver and Joubert 162 *et seq*; Watt *Contracts Concluded by Unassisted Minors* 26–36; Reinecke 1964 *THRHR* 133.

71 The Act applies to every transaction that takes place in South Africa, unless the transaction relates to the promotion or supply of goods or services to the state, a credit agreement under the National Credit Act 34 of 2005, services in terms of an employment contract, an industry-wide exemption, or giving effect to

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Section 39(1)(*b*) of the Act provides that an agreement to enter into a transaction for the supply of goods or services to an unemancipated minor consumer and an agreement to supply goods or services to such a consumer[72] is "voidable at the option of the consumer", unless it is ratified by the minor's guardian or by the minor after he or she is emancipated or becomes an adult.[73] In view of the uncertainty as to the correct description of the nature of a minor's unassisted contract and the frequent inaccurate use of the terms "void" and "voidable" to describe such contracts, it is submitted that in employing the term "voidable" the legislature did not intend to deviate from the common-law position regarding a minor's unassisted contract and to dictate that such contracts are valid until set aside by the minor. It simply used the term loosely.[74]

In terms of the common law, it is the guardian or the minor with the assistance of his or her guardian (or the minor upon reaching majority) who decides whether an unassisted contract should be repudiated or honoured.[75] It is unclear whether this rule applies to agreements which fall within the scope of the Consumer Protection Act. Because section 39(1)(*b*) of the Act provides that a minor's unassisted contract is voidable "at the option of the consumer", it is arguable that the legislature sought to indicate that the minor may independently (that is, without the assistance of his or her guardian) decide whether the agreement should be repudiated or honoured. However, it could also be argued that the guardian's assistance is still required because the wording of the section does not expressly amend the common law.[76] I favour the latter view on the ground of the presumption that statute law does not alter the existing law to a greater degree than is necessary. To my mind, there is no constitutional or other need that dictates that section 39(1)(*b*) should be found to have removed the requirement of the guardian's assistance.

Once the guardian (or the minor with the assistance of his or her guardian) has decided whether the contract should be repudiated or honoured, the other party to the contract has no option but to abide by this decision. In other words, the other party cannot rely on the minor's minority to avoid his or her own contractual obligations. Nor can the other party avoid his or her contractual obligations by invoking the *exceptio non adimpleti contractus*. This *exceptio* entails that one party to a contract that provides for reciprocal performance cannot

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a collective bargaining agreement or collective agreement in terms of the Labour Relations Act 66 of 1995, or unless the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister: s 5(1)(*a*) read with s 5(2) and (3) and the definition of "Minister". At present, the threshold value is R2 000 000: GN 294 *GG* 34181 of 1 April 2011. In certain circumstances, the Act also applies to the promotion of goods or services or the promotion of the supplier of goods or services: s 5(1)(*b*). It also applies to the goods supplied or services performed in terms of a transaction to which the Act applies and, to a limited extent, to goods that are supplied in South Africa in terms of a transaction to which the Act does not apply: s 5(1)(*c*) and (*d*). A "supplier" is a person who markets any goods or services: s 1.

72 A consumer includes (1) a person to whom goods or services are marketed in the ordinary course of a supplier's business; and (2) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction relates to a credit agreement under the National Credit Act, services in terms of an employment contract, an industry-wide exemption, or giving effect to a collective bargaining agreement: pars (*a*) and (*b*) of the definition of "consumer" read with s 5(2)(*a*), (*c*)–(*g*) and (3). In certain circumstances, a franchisee also qualifies as a consumer: par (*d*) of the definition of "consumer" in s 1.

73 On ratification, emancipation, and the age of majority, see below in this chapter.

74 See also Boezaart *Persons* 94 fn 196; Schäfer *Child Law* 202–203. But see Watt *Contracts Concluded by Unassisted Minors* 94; Bhana and Visser 2014 *THRHR* 191–192.

75 On the rule that while the minor's minority lasts the guardian, and not the minor independently, must make the decision, see Voet 29.2.34; *Rhode v Minister of Defence* 1943 CPD 40; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

76 See also Watt *Contracts Concluded by Unassisted Minors* 94 fn 73. Bhana and Visser 2014 *THRHR* 191 and 192 seem to favour this view, but state that the standard of the best interests of the child might require that an individual assessment should be made in order to decide whether the particular minor should be assisted by his or her guardian.

claim the other party's performance without also performing or tendering performance. As the *exceptio* is founded on the principle of reciprocity, it cannot be invoked against someone whose performance is not yet due or someone who is not contractually bound to perform at all – as is the position in the case of an unassisted minor. Thus it does not offer an avenue for withholding performance to someone who has entered into a contract with an unassisted minor. Nor does it enable that person to hold the minor to the terms of the contract.[77]

What normally happens is that the minor raises his or her minority as a defence when sued on the contract. However, nothing precludes the minor from taking the initiative and applying for an order declaring that he or she is not contractually liable.[78] The minor cannot sue the other party for performance in terms of the contract while withholding his or her own performance, because the minor would need his or her guardian's consent for the litigation[79] and if the guardian consents to the litigation, the guardian will obviously be ratifying the minor's contract.[80]

If a minor has performed in terms of an unassisted contract and the contract is repudiated, the minor may recover whatever he or she has performed.[81] Property other than money is recovered by the *rei vindicatio* and money by a *condictio*.[82] The value of the minor's performance is reduced by the amount by which the minor was unjustifiably enriched by the other party's performance.[83] Because a minor's unassisted contract cannot be enforced against the minor, the minor does not have to apply for *restitutio in integrum* (that is, return to the previous position) in order to recover his or her performance.[84] *Restitutio in integrum* applies if the minor, with the required assistance, entered into a contract which was to his or her detriment when it was made and he or she has performed in terms of that contract.[85]

The minor's natural obligation may serve as the object of a suretyship,[86] and it can be novated[87] and ceded.[88]

(ii) *Assistance by the guardian*

General

The objective of the rule that a minor cannot incur contractual liability without his or her guardian's assistance is to protect the minor against his or her own immaturity of judgement.[89] This consideration falls away if the minor acts with the guardian's assistance. Then the minor is liable *ex contractu* as if he or she were a major.[90]

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77 Barratt in Barratt (ed.) *Persons and the Family* 46 fn 62; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 807–808.

78 *Rhode v Minister of Defence* 1943 CPD 40.

79 A minor's capacity to litigate is discussed below in this chapter.

80 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

81 On a minor's right to recover performance, see in general Voet 4.4.21, 26.8.4, 44.7.3; Grotius 3.30.11, 3.39.11; Van der Keessel *Theses Selectae* 529, *Praelectiones* 1.8.5; *Baddeley v Clarke* (1923) 44 NLR 306; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C).

82 See e.g. Barratt in Barratt (ed.) *Persons and the Family* 46; Boezaart *Persons* 75; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 801; Kruger and Skelton (eds) *Persons* 122–123; Van der Vyver and Joubert 164–165; Watt *Contracts Concluded by Unassisted Minors* 89–93; *Wille's Principles* 179; Reinecke 1964 *THRHR* 138 fn 38; Bhana and Visser 2014 *THRHR* 184.

83 *Baddeley v Clarke* (1923) 44 NLR 306. Unjustified enrichment is discussed below in this chapter.

84 See e.g. Voet 4.1.13, 4.4.21, 4.4.47, 4.4.52; Grotius 3.48.10; *Du Toit v Lotriet* 1918 OPD 99; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A); *Edelstein v Edelstein* 1952 (3) SA 1 (A).

85 *Edelstein v Edelstein* 1952 (3) SA 1 (A). On *restitutio in integrum*, see further below in this chapter.

86 Voet 4.4.39, 26.8.4, 44.7.3; Grotius 3.3.22, 3.48.12; Van Leeuwen *Censura Forensis* 1.4.3.2, 1.4.43.10.

87 Voet 44.7.3.

88 Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 785 fn 78; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469; Kruger and Skelton (eds) *Persons* 123; Reinecke 1964 *THRHR* 136.

89 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

90 See e.g. Voet 14.5.4, 26.9.1, 26.9.2; Van der Keessel *Theses Selectae* 133; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Wood v Davies* 1934 CPD 250, Heaton *Casebook on the Law of Persons* case **[34]**; *Van Dyk v SAR & H* 1956 (4) SA 410 (W), Heaton *Casebook on the Law of Persons* case **[27]**.

If the minor has more than one guardian, the consent of one of them is usually sufficient. However, in some instances, such as the alienation or encumbrance of the minor's immovable property, the consent of all the guardians of the minor is required.[91]

The guardian's assistance may take various forms. In the first place the guardian may act on the minor's behalf.[92] Alternatively, the minor may personally enter into the contract with his or her guardian's consent[93] or the guardian may ratify the agreement after it has been concluded.[94]

The guardian's consent may be given expressly or tacitly,[95] and it may relate to a single transaction or to several. For example, if parents allow their child to conduct his or her own business, the minor may enter into all transactions relating to that business.[96]

Whether or not a minor in fact has the required consent depends on the circumstances of each particular case. As Caney[97] puts it:

> To give his assistance the guardian must bring his mind deliberately to bear upon the subject: his mere assent without consideration, especially if it be subsequent, is valueless . . . Nor is knowledge by him of the fact of a contract without information of its terms to be construed as assistance by him.

The guardian need not have knowledge of each and every term of the contract, but must be aware of its nature and essential terms.[98] Consent obtained through fraud or undue influence is worthless.[99] A guardian who has consented to a transaction may withdraw consent prior to the conclusion of the transaction.[100]

The guardian is obliged to assist the minor in entering into legal transactions which are beneficial to the minor, or to conclude such transactions on the minor's behalf. If the guardian is unable or unwilling to do this, the court may order the guardian to do so or itself give the required consent.[101] The court will also intervene if the guardian's own interests in a transaction clash with his or her duty to further the minor's interests,[102] or where the guardian's consent is insufficient in itself (for example, in respect of alienating or mortgaging a minor's immovable property).[103]

There are some contracts the guardian cannot conclude on the minor's behalf although the guardian may consent to the minor's entering into such contracts. This is the case in respect of an agreement of a closely personal nature (such as an antenuptial contract),[104]

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91 Children's Act s 18(3)(*c*)(v) read with s 18(5).

92 See e.g. Voet 26.9.1, 26.9.2; Grotius 1.8.5, 1.8.7, 3.48.10; Van der Keessel *Theses Selectae* 133; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Ten Brink v Motala* 2001 (1) SA 1011 (D).

93 See e.g. Voet 4.4.21, 26.8.3, 39.5.7; Grotius 3.48.10; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Wood v Davies* 1934 CPD 250; *Dhanabakium v Subramanian* 1943 AD 160; *Van Dyk v SAR & H* 1956 (4) SA 410 (W).

94 Ratification is discussed below in this chapter.

95 *McCallum v Hallen* 1916 EDL 74; *Ex parte Blignaut* 1963 (4) SA 36 (O).

96 This is known as emancipation. On emancipation, see further below in this chapter.

97 1930 *SALJ* 182. See further *Rousseau v Norton* (1908) 18 CTR 621; *De Beer v Estate De Beer* 1916 CPD 125; *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Fouché v Battenhausen & Co* 1939 CPD 228, Heaton *Casebook on the Law of Persons* case **[31]**; *Ex parte Blignaut* 1963 (4) SA 36 (O).

98 *Van Dyk v SAR & H* 1956 (4) SA 410 (W).

99 *Auret v Hind* (1884) 4 EDC 283; *Du Toit v Lotriet* 1918 OPD 99.

100 *Schoeman v Rafferty* 1918 CPD 485.

101 Voet 26.8.8.

102 *D* 26.8.1 *pr*; Voet 26.8.6; Grotius 1.7.11; Van Leeuwen *Rooms-Hollands-Regt* 1.16.4.

103 In such event the court (or the Master of the High Court if the value of the property does not exceed the amount the Minister of Justice and Constitutional Development sets by notice in the *GG*) must also consent to the transaction: Administration of Estates Act 66 of 1965 s 80(1).

104 *Ex parte Potgieter et Uxor* 1943 OPD 4. An antenuptial contract is a contract between future spouses or civil union partners in which they regulate the consequences of their future marriage or civil union and, in particular, the matrimonial property system which is to apply to it. The matrimonial property system determines whether the couple's marriage or civil union is in or out of community of property. On antenuptial contracts, see further Heaton and Kruger *Family Law* ch 7.

and a contract that will come into operation only after the minor has attained majority.[105]

It is submitted that a guardian may not conclude an employment contract that contravenes section 43 of the Basic Conditions of Employment Act 75 of 1997 on behalf of the minor or consent to the minor's entering into such a contract. Section 43(1) provides that a minor who is below the age of 15 years or below the minimum legal school-leaving age may not be required or permitted to work. Section 43(3) provides that a person who requires or permits such a minor to work commits an offence. Although a contract that is concluded in contravention of a statutory prohibition is not necessarily void,[106] it is submitted that a contract that contravenes section 43 ought to be illegal and void.[107] South Africa has ratified various international instruments which combat child labour and require the setting of a minimum age for entry into employment. These instruments include the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and Convention 138 of the International Labour Organisation of 1973.[108] The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child further require states parties to provide for appropriate penalties or other sanctions to ensure effective enforcement of, *inter alia*, the ban on the employment of children below the minimum employable age. Section 43 complies with the requirement regarding the minimum employable age these international instruments set. Enforcement of the minimum employable age would be much more effective if no recognition at all were afforded to a contract that contravenes section 43. Nullity of the contract, linked with imposition of the criminal sanction on the employer, would be a much more appropriate penalty and sanction, and would send a much stronger message of discouragement of child labour than would the mere imposition of a criminal sanction on the offending employer.[109]

A guardian may conclude an insurance contract on the minor's life or assist the minor in entering into such a contract. The benefits that may be paid in terms of the insurance policy are, however, limited by statute if the minor is below the age of 14 years.[110]

Liability of the guardian

As a rule, the guardian does not incur personal liability in respect of the minor's contract, regardless of whether the guardian assists the minor or acts on the minor's behalf.[111] The other party can therefore not claim performance of the minor's obligations from the

105 *Du Toit v Lotriet* 1918 OPD 99.

106 If the particular Act is silent on whether contravention results in nullity, the contract may be held to be voidable or even valid: see e.g. the expositions in Van Rensburg, Lotz and Van Rhijn *LAWSA* vol 9 *Contract* par 335 and *Wille's Principles* 761–763, and the case law cited there.

107 See also Barratt in Barratt (ed.) *Persons and the Family* 68–69; Boezaart *Persons* 86; Grogan *Workplace Law* 39; Kruger and Skelton (eds) *Persons* 118.

108 See art 32 of the Convention on the Rights of the Child and art 15 of the African Charter on the Rights and Welfare of the Child. Convention 138 of the International Labour Organisation specifically dictates that the minimum age should not be lower than the minimum school-leaving age and may not be less than 15 years. It, however, allows developing countries initially to set the minimum age at 14 years under certain circumstances. In the case of "light work", the minimum age may be 13 years (or 12 years in the case of developing countries which set 14 years as the general minimum age). South Africa ratified Convention 138 in 2000.

109 On the above-mentioned international instruments and child labour generally, see e.g. Church and Church *LAWSA* vol 2 part 2 *Children* pars 70–71; Schäfer *Child Law* 140–141; South African Law Commission *Discussion Paper Review of the Child Care Act* par 13.5 and *Report on the Review of the Child Care Act Discussion Paper 103 Project 110* par 12.4; Mayimele-Hashatse in Davel (ed.) *Children's Rights in a Transitional Society* 79–87; Nhenga-Chakarisa 2010 *AHRLJ* 161.

110 Long-term Insurance Act s 55. On minors and insurance contracts, see further Van Niekerk 2006 *SA Merc LJ* 204.

111 Van der Keessel *Theses Selectae* 133; Van Leeuwen *Censura Forensis* 1.1.17.10–1.1.17.13; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Ex parte Fortoen* 1938 WLD 62; *Fouché v Battenhausen & Co* 1939 CPD 228.

guardian.[112] The guardian is, however, liable on the contract if the minor acted as his or her agent.[113]

A guardian is also liable if he or she guaranteed the minor's performance or bound himself or herself as surety for the minor's performance.[114] In this situation the guardian's liability arises only if the minor does not perform in terms of the contract.

A guardian may also incur liability on the basis of *negotiorum gestio* if he or she is the child's parent. Parents have a duty to support their children.[115] If a third party fulfils the duty of support on behalf of a parent by supplying his or her child with necessaries like food and clothing, the parent may be liable on the basis of *negotiorum gestio*. In this case the guardian's liability does not arise contractually but quasi-contractually.[116]

(iii) *Ratification*

As a minor's unassisted contract is not invalid but creates a natural obligation, it can be ratified by the guardian or by the minor once he or she has attained majority. Ratification converts the minor's natural obligation into a civil one with the result that the contract becomes fully enforceable as against both parties with retroactive effect.[117] However, a guardian cannot ratify a contract he or she could not validly have concluded on the minor's behalf at the time when the contract was made.[118]

Ratification may take place either expressly or tacitly.[119] Express ratification presents no problem, but it can be quite difficult to determine whether a contract has been tacitly ratified, especially if ratification by a minor who has attained majority is at issue. The court considers the former minor's conduct, and deduces from all the circumstances whether or not he or she had the intention of ratifying the contract.[120]

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112 Our courts have, however, sometimes adopted the opposite view: see e.g. *McCallum v Hallen* 1916 EDL 74; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497. In *Skead*'s case it was held that a guardian who enters into a contract which is detrimental to the minor's interests is personally liable on that contract. This view is incorrect, as the parties to the contract never intended that the guardian should be personally liable. The incorrect view is based on a wrong interpretation of Voet 15.1.11 and is not supported; see also Voet 26.9.2, 26.9.3; Van Leeuwen *Censura Forensis* 1.1.17.13; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); Barratt in Barratt (ed.) *Persons and the Family* 52; Boezaart *Persons* 66; Boezaart in Boezaart (ed.) *Child Law in South Africa* 30; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 796; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469, 475; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 32; Kruger and Skelton (eds) *Persons* 118; Schäfer *Child Law* 200; Van der Vyver and Joubert 158.

113 *McCallum v Hallen* 1916 EDL 74; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O).

114 Barratt in Barratt (ed.) *Persons and the Family* 52; Boezaart *Persons* 67; Boezaart in Boezaart (ed.) *Child Law in South Africa* 30; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 798; Cronjé *LAWSA* vol 20 part 1 *Persons* par 475; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 32; Kruger and Skelton (eds) *Persons* 118; Van der Vyver and Joubert 158, 167; Spiro 1951 *SALJ* 178 *et seq*. The surety remains liable even if the minor, not having had the required consent, is not liable: Voet 44.7.3.

115 On the parental duty of support, see Heaton and Kruger *Family Law* 303–310, 349–352.

116 *The Colonial Government v William Meldrum* (1890) 11 NLR 139; *Schreiber v Paper* (1906) 20 EDC 34; *McCallum v Hallen* 1916 EDL 74; *Mazzur v Cleghorn & Harris Ltd* 1917 CPD 291; *Fillis v Joubert Park Private Hospital (Pty) Ltd* 1939 TPD 234. See further Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 780, 798, 813.

117 See e.g. Voet 26.8.1; Van Leeuwen *Censura Forensis* 1.1.17.10; *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Fouché v Battenhausen & Co* 1939 CPD 228; *Perkins v Danford* 1996 (2) SA 128 (C).

118 *Du Toit v Lotriet* 1918 OPD 99.

119 Voet 4.4.44; *De Villiers v Liebenberg* (1907) 17 CTR 867; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

120 Voet 4.4.44; *Stuttaford & Co v Oberholzer* 1921 CPD 855, Heaton *Casebook on the Law of Persons* case [29]. See also *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C).

It is unclear whether a former minor who is unaware of his or her rights can ratify a contract after attaining majority. The former minor may, for example, not know that he or she is not contractually liable and is entitled to repudiate the contract. Would an act that would normally amount to ratification, be ratification in such circumstances? On the one hand, one can rely upon the maxim *ignorantia iuris haud excusat* (that is, ignorance of the law is no excuse). According to this view the former minor's ratification is assumed and the minor is contractually liable.[121] On the other hand, because of the decision of the Appellate Division (now the Supreme Court of Appeal) in *S v De Blom*[122] that *ignorantia iuris haud excusat* no longer applies without qualification, it seems that an inference of ratification can be rebutted if the former minor's ignorance is reasonable and excusable.[123]

In *Edelstein v Edelstein*[124] it was held that an antenuptial contract that was concluded without the necessary consent cannot be ratified by the minor or the minor's guardian once the marriage has taken place, because ratification would amount to an impermissible change of the matrimonial property system.[125] This is still the position if the minor enters into a civil or customary marriage with consent but concludes an antenuptial contract without consent.

In terms of the Civil Union Act 17 of 2006, only persons who have already reached the age of 18 years may enter into a civil union.[126] Thus a minor cannot validly enter into a civil union regardless of whose consent he or she obtains. However, he or she might conclude an unassisted antenuptial contract in anticipation of a civil union he or she intends entering into upon attaining majority. In such event, the antenuptial contract could be ratified prior to the coming into existence of the civil union. Once the civil union has taken place, the decision in *Edelstein v Edelstein*[127] would apply[128] and ratification would be impermissible. The position would be the same if a minor concluded an unassisted antenuptial contract in anticipation of a civil or customary marriage he or she intended entering into upon attaining majority.

(iv) *Statutory exceptions regarding a minor's capacity to incur contractual liability*

Some Acts create exceptions to the rule that a minor cannot incur contractual liability without his or her guardian's assistance. For example:

(1) Unless the articles of the particular mutual bank provide otherwise, a minor over the age of 16 years may be a member of or a depositor with any mutual bank. He or she may, without the consent or assistance of his or her guardian, execute all necessary documents, give all necessary acquittances, and cede, pledge, borrow against and generally deal with his or her share or deposit as he or she thinks fit.[129]

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121 See e.g. Wessels *Contract* pars 856–857; Caney 1930 *SALJ* 194.

122 1977 (3) SA 513 (A).

123 See also Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 805–806. Cockrell further points out that the issue is bound up with the more general question of waiver of rights in ignorance of the law. He *inter alia* refers to *Van der Merwe v Die Meester* 1967 (2) SA 714 (SWA) 724 where Muller J concluded that "onkunde van die reg . . . by 'n geval van afstanddoening vergewe kan word, nieteenstaande die beginsel *ignorantia juris haud excusat*, mits sodanige onkunde as waarskynlik aanvaar word en regverdigbaar is". Kruger and Skelton (eds) *Persons* 123 and Watt *Contracts Concluded by Unassisted Minors* 53 fn 99 support Cockrell's submission that this approach should extend to ratification by a former minor so that an inference of ratification could be refuted by proof that the minor was reasonably and excusably ignorant of the right to repudiate the contract. So do I. (The view propounded by Cockrell was originally expressed in Boberg 590.)

124 1952 (3) SA 1 (A), Heaton *Casebook on the Law of Persons* case [33].

125 On postnuptial alteration of the matrimonial property system, see Heaton and Kruger *Family Law* ch 8.

126 See the definition of "civil union" in s 1 of the Act.

127 1952 (3) SA 1 (A).

128 In terms of s 13 of the Civil Union Act, the consequences of a civil union match those of a marriage, except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned. Thus decisions regarding a civil marriage apply equally to a civil union except in so far as they relate specifically to the Marriage Act.

129 Mutual Banks Act s 88(1).

(2) Unless the memorandum of association or articles of association of a bank provide otherwise, a minor over the age of 16 years may be a depositor with a bank. He or she may, without the consent or assistance of his or her guardian, execute all necessary documents, give all necessary acquittances, and cede, pledge, borrow against and generally deal with his or her deposit as he or she thinks fit.[130]

(3) If the rules of a registered friendly society permit this, any minor may be a member of the friendly society. Once the minor has turned 16, he or she may execute all necessary documents and give all necessary acquittances without the consent of his or her guardian.[131]

(v) *Misrepresentation by the minor*

It is generally agreed that a minor who misrepresents himself or herself to be a major, to be emancipated, or to have the necessary consent, and who thereby misleads somebody to enter into a contract with him or her, ought to be liable,[132] but there is no unanimity on the basis for such liability. The two possible grounds on which the minor could be held liable are the contract he or she entered into and the delict he or she committed (namely, the misrepresentation). Each of these bases is considered below.

Contractual liability

Those who advocate contractual liability for a minor who committed a misrepresentation advance various reasons for their theory. In the first place they point out that the Roman-Dutch writers expressly denied the remedy of *restitutio in integrum*[133] to a minor who committed a misrepresentation.[134] *Restitutio in integrum*, it is argued, presupposes a binding contract and, as the old writers deal with, and deny, the remedy to the fraudulent minor, it is implied that there is a binding underlying contract.[135]

This argument is unconvincing because *restitutio in integrum* has been relied upon in circumstances where it was unnecessary to do so. *Restitutio in integrum* should only be used in respect of a minor's binding contract (that is, in respect of a contract the minor concluded with the necessary assistance or a contract the minor's guardian concluded on the minor's behalf).[136] However, Roman-Dutch practice was also to apply for *restitutio in integrum* in cases where a minor had entered into an unassisted contract.[137] In these circumstances the minor was in fact not contractually liable and therefore did not have to rely on *restitutio in integrum*; the minor could, instead, simply have used the *rei vindicatio* or a *condictio* to recover the performance he or she had rendered in terms of the unenforceable contract. Invocation of *restitutio in integrum* in circumstances where it was unnecessary to rely on the remedy surely

130 Banks Act 94 of 1990 s 87(1).

131 Friendly Societies Act 25 of 1956 s 16.

132 See e.g. Voet 4.4.43, 27.9.13; Van Leeuwen *Censura Forensis* 1.4.43.7; *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91, Heaton *Casebook on the Law of Persons* case **[30]**; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); Barratt in Barratt (ed.) *Persons and the Family* 57, 58; Boezaart *Persons* 83; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 817; Donaldson *Minors* 27–33; Kruger and Skelton (eds) *Persons* 126–128; Schäfer *Child Law* 201–202; Watt *Contracts Concluded by Unassisted Minors* 133; Bhana and Visser 2014 *THRHR* 185.

133 *Restitutio in integrum* is discussed below in this chapter.

134 Voet 4.4.43, 27.9.13; Van Leeuwen *Censura Forensis* 1.4.43.7; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

135 *Pleat v Van Staden* 1921 OPD 91; *Fouché v Battenhausen & Co* 1939 CPD 228; De Wet and Van Wyk 63; Van der Vyver and Joubert 156–157.

136 See e.g. *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11A where it was said: "Restitution presupposes a binding contract; therefore one concluded by a minor with the assistance of his guardian".

137 Voet 4.1.13; *Breytenbach v Frankel* 1913 AD 390; *Du Toit v Lotriet* 1918 OPD 99.

does not justify the inference that the minor is contractually liable purely because of his or her misrepresentation. As Cockrell[138] puts it:

> [T]he unassisted minor's contract does not require setting aside by *restitutio in integrum*: it is simply not binding on the minor as a matter of law. How, then, can minors be punished for fraud by denying them a remedy that is not needed in any event?

In this context the decision in *Louw v MJ & H Trust (Pty) Ltd*[139] should be mentioned. Judge Eloff held that because the minor had misrepresented himself as emancipated when he bought a motor cycle from a major without the necessary assistance, he could not recover the part of the purchase price he had already paid. Judge Eloff further held that the fact that a fraudulent minor is denied *restitutio in integrum* does not mean that he is contractually bound because of his misrepresentation. Judge Eloff argued that because the minor is not contractually bound, he cannot be ordered to pay the balance of the purchase price. The minor's misrepresentation therefore does not result in the contract being enforced against him. It merely results in the minor not being allowed to claim *restitutio in integrum*, and because the minor cannot claim *restitutio in integrum* he cannot recover the contractual payments he made.

It is submitted that this decision is wrong.[140] It is indeed correct to say that refusing the minor *restitutio in integrum* does not mean that the minor becomes contractually liable. Once it is agreed that a minor who enters into an unassisted contract cannot be contractually liable it is clear that the remedy of *restitutio in integrum* is not required at all. As indicated above, if a contract is not enforceable against someone, he or she can simply recover his or her performance with the *rei vindicatio* or a *condictio*. Thus the court erred in holding that denying the minor *restitutio in integrum* barred him from recovering the part of the purchase price he had already paid. The result of Judge Eloff's decision is that the minor was both held bound because he was not allowed to recover the payments he had made, and not bound because he was not compelled to pay the balance of the purchase price. This is untenable. Either the minor is contractually liable, in which case he cannot recover what he has performed and is bound to carry out his remaining obligations, or he is not contractually liable, in which case he may recover what he has performed and is not bound to render further performance. In *Louw*'s case the minor's claim for recovery of payments already made should therefore have been upheld and the major's counterclaim for full payment of the outstanding amount should have been dismissed.[141] This would not have left the major without a remedy, for he or she could still have sued the minor in delict or for unjustified enrichment.[142]

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138 Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 818–819, whose statements are based on Boberg 600–601. See also Barratt in Barratt (ed.) *Persons and the Family* 58; Boezaart *Persons* 84–85; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson *Minors* 29–30; Hahlo and Kahn *South Africa* 381; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31 fn 212; Kruger and Skelton (eds) *Persons* 126–127; Schäfer *Child Law* 202; Schäfer in Clark (ed.) *Family Law Service* par E71; Watt *Contracts Concluded by Unassisted Minors* 156; Wessels *Contract* pars 830–843; Bhana and Visser 2014 *THRHR* 185.

139 1975 (4) SA 268 (T), Heaton *Casebook on the Law of Persons* case **[32]**.

140 See also Boezaart *Persons* 84; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 821; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Kruger and Skelton (eds) *Persons* 127; but see Scott *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Absence of Legal Ground?* (University of Oxford: Thesis, 2005) 196 as cited in Visser *Unjustified Enrichment* 549 who is of the view that in *Louw v MJ & H Trust (Pty) Ltd restitutio in integrum* was the correct remedy. Du Plessis 83 is of the view that some of the objections against using *restitutio in integrum* are unconvincing, but he doubts whether it would be beneficial to rely on *restitutio in integrum* because claims based on enrichment "provide more appropriate protection to the minor in terms of the quantification of liability". See also Du Plessis 84.

141 Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 822 fn 184; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470.

142 These remedies are discussed below in this chapter.

In the second place those who advocate contractual liability of a minor who commits misrepresentation rely on estoppel.[143] They argue that if someone enters into a contract with a minor on the strength of the minor's misrepresentation, the minor cannot raise his or her minority as a defence. Consequently the minor is held liable as if he or she were in fact a major when the contract was concluded. The other party can therefore simply sue the minor on the contract and then, by means of estoppel, frustrate any reliance by the minor on his or her minority. This argument should be rejected on policy grounds: invoking estoppel to hold the minor to the false impression he or she created and enforcing the contract against him or her has the undesirable consequence of permitting the minor to alter his or her capacity to act by committing a misrepresentation even though his or her fraudulent conduct or omission does not inevitably mean that he or she has the necessary ability to judge and that he or she therefore does not need the legal protection that is ordinarily afforded to minors.[144]

It is arguable that section 39(2) of the Consumer Protection Act is authority for the view that a fraudulent minor is contractually liable in so far as agreements in terms of the Act are concerned.[145] In terms of section 39(1)(*b*) of the Act, an agreement to enter into a transaction for the supply of goods or services to an unemancipated minor consumer and an agreement for the supply of goods or services to such a consumer are voidable at the option of the consumer unless the consumer has the consent of his or her guardian to enter into the agreement or the agreement is ratified.[146] Section 39(2) creates an exception to this rule. It provides that the rule does not apply if the minor or somebody acting on the minor's behalf induced the supplier to believe that the minor had unfettered capacity to enter into the contract or if the minor or person acting on his or her behalf tried to obscure or suppress the fact that the minor did not have unfettered capacity to enter into the contract. Although this section does not expressly state that a fraudulent minor is contractually liable, the implication of the inapplicability of the rule might be that the contract is voidable at the option of the minor.[147] However, accepting this argument would lead to the same policy concern that applies in respect of invoking estoppel to hold a fraudulent minor to the false impression he or she created and enforcing the contract against him or her, namely that it is undesirable to permit the minor to alter his or her capacity to act by committing a misrepresentation.

Delictual liability

It is submitted that delict ought to be the basis on which the fraudulent minor is held liable.[148] By making delict the basis of liability, the cases in which the minor was held liable

143 Van der Vyver and Joubert 157; Pauw 1976 *THRHR* 83–84. The courts have not yet specifically considered estoppel as a ground of liability on the part of the minor although it was said in *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252 254 that "there can be no doubt that under Roman-Dutch Law where the minor represents himself to be of age, and by virtue of the representation enters into a contract that he is generally bound by that representation".

144 See also *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 273H; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 824–825, 826; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson *Minors* 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31; Kruger and Skelton (eds) *Persons* 127–128; Schäfer *Child Law* 202; Sonnekus *Estoppelleerstuk* 195; Wessels *Contract* pars 830–831.

145 See fn 71 above on the transactions that are governed by the Act.

146 On this section, see above in this chapter.

147 Boezaart *Persons* 85; Watt *Contracts Concluded by Unassisted Minors* 136. But see Bhana and Visser 2014 *THRHR* 193 who argue that, because the section simply states that the rule in s 39(1) "does not apply", "[t]his could mean either that the contract is valid (rather than voidable) or that the common law regulating the scenario of the fraudulent minor must apply instead".

148 See also Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 826; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson *Minors* 30; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31; Kruger and Skelton (eds) *Persons* 128; Schäfer *Child Law* 202; Spiro *Parent and Child* 115; *Wille's Principles* 181; Bhana and Visser 2014 *THRHR* 186.

for the contract price are not explained.[149] However, in those cases there was no discussion of the ground on which the minor was held liable and it is therefore doubtful whether they can serve as authority to substantiate the basis of the minor's liability as being contractual in nature.

If a minor openly claims to be a major, to have the necessary assistance, or to be emancipated, there is no doubt that he or she is committing a misrepresentation.[150] The other party does not have to enquire into the truth of the minor's statement unless he or she has good cause for believing that he or she is in fact dealing with a minor.[151] In the case of a tacit misrepresentation the issue is whether the minor's conduct amounts to a misrepresentation. This depends on the circumstances of each case. If the minor knows that the other party thinks he or she is a major, is emancipated, or has the necessary consent and does nothing to remove this erroneous belief, the minor commits a misrepresentation.[152] In the case of an erroneous belief that the minor is a major, the minor must be old enough to be reasonably mistaken for a major.[153] However, if the other party is the minor's blood relation, it is accepted that he or she knew that the minor was in fact a minor.[154]

Once it has been established that the minor committed a misrepresentation, the *onus* rests on the minor to prove that the other party was not misled. The misrepresentation must have been the cause that induced the other party to enter into the contract with the minor.[155] Obviously, the other party must have suffered loss.

(vi) *Unjustified enrichment*

In terms of Roman and Roman-Dutch law, a minor incurred liability if he or she entered into an unassisted contract and benefited from the contract. The benefit theory was adopted in our law in *Nel v Divine, Hall & Co*[156] in which it was held that if a contract, taken as a whole, was to the minor's benefit, the minor was bound by it.[157] This view, although incorrect, was applied fairly consistently by our courts[158] until it was authoritatively rejected by the Appellate Division in *Edelstein v Edelstein*.[159] In *Edelstein* it was correctly held that a minor is not contractually liable whenever a contract is in "a vague and general way" to his or her advantage,[160] but that the minor may be held liable *ex lege* on the ground of unjustified enrichment.[161]

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149 See e.g. *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91; *Fouché v Battenhausen & Co* 1939 CPD 228.

150 *Pleat v Van Staden* 1921 OPD 91.

151 Voet 4.4.43; *Pleat v Van Staden* 1921 OPD 91; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

152 Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 828; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Kruger and Skelton (eds) *Persons* 128. See also s 39(2) of the Consumer Protection Act.

153 *Pleat v Van Staden* 1921 OPD 91; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

154 Voet 4.4.43; *Pleat v Van Staden* 1921 OPD 91.

155 *Pleat v Van Staden* 1921 OPD 91; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

156 (1890) 8 SC 16.

157 Prior to this decision there had been judgments following the Roman-Dutch rule, i.e. that an unassisted minor is not liable on the contract: see e.g. *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Fouchee v De Villiers* (1883) 3 EDC 147; and also the later cases *Groenewald v Rex* 1907 TS 47 and *Tanne v Foggitt* 1938 TPD 43.

158 See e.g. *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Silberman v Hodkinson* 1927 TPD 562.

159 1952 (3) SA 1 (A). Prior to this case the Transvaal court had already rejected this approach in *Tanne v Foggitt* 1938 TPD 43.

160 12EF.

161 Capacity to act is not a requirement for liability based on enrichment. On the issue of which *condictio* is to be used, see Du Plessis 80–82; Visser *Unjustified Enrichment* 547–551; Watt *Contracts Concluded by Unassisted Minors* 91–92.

Liability on the ground of unjustified enrichment arises if one person obtains a patrimonial advantage (that is, is enriched) at the expense of another in the absence of a legal ground justifying the enrichment.[162] The enrichment claim is limited to the lesser of either the amount by which the enriched person's estate remains enriched at the date of institution of the action or the amount by which the other person's estate remains impoverished at that date.[163] In arriving at this amount the contract price is ignored; it is the actual value of the asset at the time of institution of the action that is at issue.[164] Accordingly, if the value of the asset has decreased by the time the action is instituted, it is the decreased value that is used. If the asset was lost prior to the institution of the action, the impoverished party cannot claim anything. If the asset was alienated, the impoverished party can claim only what is left of the proceeds, unless the enriched party used the proceeds to obtain necessaries, such as food, clothing, accommodation and medical treatment.[165] In the latter case, the cost of the necessaries is the value that is used to determine the amount of the enrichment even if nothing remains of those necessaries. The reason for this rule is that the enriched party would have had to pay for the necessaries out of his or her own pocket were it not for the fact that he or she had the asset or its proceeds. Therefore the extent of his or her enrichment is equal to the cost of the necessaries.[166]

The difference between contractual liability and liability on the ground of unjustified enrichment can involve a great deal of money. Contractual liability entails that the minor is liable for the contract price, irrespective of when the action is instituted. In contrast, if the minor is liable on the ground of unjustified enrichment, he or she is only liable for the value of the asset at the time when the action is instituted. The amount for which the minor may be liable on the ground of unjustified enrichment may therefore be much less than the contract price.

(vii) *Restitutio in integrum*

If a minor entered into a contract with his or her guardian's consent or if the guardian validly entered into a contract on the minor's behalf, the minor may still escape contractual liability by relying on *restitutio in integrum*.[167] *Restitutio in integrum* is available even if the court consented to the minor's contract, because the court might have erred or might have been misled.[168]

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162 See e.g. *Pretorius v Van Zyl* 1927 OPD 226; *Nortjé v Pool* 1966 (3) SA 96 (A); *McCarthy Retail Ltd v Short-distance Carriers CC* [2001] 3 All SA 236 (SCA), 2001 (3) SA 482 (SCA).

163 Barratt in Barratt (ed.) *Persons and the Family* 17, 47; Boezaart *Persons* 77, 78; Boezaart in Boezaart (ed.) *Child Law in South Africa* 31; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 811; De Wet and Van Wyk 61; Du Plessis 80–81; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 34; Kruger and Skelton (eds) *Persons* 125; Lotz *LAWSA* vol 9 *Enrichment* par 209; Sonnekus *Ongegronde Verryking* 167–168; Van der Vyver and Joubert 165, 166–167; Visser *Unjustified Enrichment* 161, 163, 730; *Wille's Principles* 181–182. See further *Wille's Principles* 1048–1051. Van den Heever JA refers to "the time of the action" in *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12F.

164 Barratt in Barratt (ed.) *Persons and the Family* 17, 49; Boezaart *Persons* 78; Kruger and Skelton (eds) *Persons* 125; Sonnekus *Ongegronde Verryking* 52.

165 Grotius 3.30.3; *Edelstein v Edelstein* 1952 (3) SA 1 (A); see also Boezaart *Persons* 78; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 811–814; De Wet and Van Wyk 61; Du Plessis 81; Kruger and Skelton (eds) *Persons* 125; Sonnekus *Ongegronde Verryking* 56; Van der Vyver and Joubert 166; Visser *Unjustified Enrichment* 732–736; Watt *Contracts Concluded by Unassisted Minors* 96–98; *Wille's Principles* 182, 1048–1051.

166 Barratt in Barratt (ed.) *Persons and the Family* 50; Boezaart *Persons* 78; De Vos 46; Kruger and Skelton (eds) *Persons* 125; Sonnekus *Ongegronde Verryking* 56; Van der Vyver and Joubert 166; *Wille's Principles* 182. See further Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 813.

167 See e.g. Voet 4.4.12–4.4.54; Van der Keessel *Theses Selectae* 133; Van Leeuwen *Censura Forensis* 1.4.43.1–1.4.43.2; *Breytenbach v Frankel* 1913 AD 390; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Wood v Davies* 1934 CPD 250; *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA).

168 Voet 4.4.15; *In re Nooitgedacht: Ex parte Wessels* (1902) 23 NLR 81; *De Wet v Bouwer* 1919 CPD 43.

Restitutio in integrum is an extraordinary remedy and is only available if the contract was prejudicial to the minor when it was concluded.[169] Prejudice arising at some later stage is irrelevant.[170]

The purpose of *restitutio in integrum* is to restore the *status quo ante* (that is, the previous position). This means that complete restitution from both sides must take place, placing both parties in the position they would have been in had they never entered into the contract. Each party must return everything he or she received under the contract, as well as the proceeds or any advantage derived from the contract. Each party must also compensate the other for any loss suffered as a result of the contract.[171]

As indicated above in this chapter, *restitutio in integrum* is only necessary if the minor is indeed contractually liable. Therefore, if the minor did not have the requisite assistance when he or she entered into the contract, he or she is not contractually liable and need not seek *restitutio in integrum*.[172] If some doubt exists as to whether or not the minor is contractually liable, the minor could apply for *restitutio in integrum*, but then the minor would have to prove that the contract was to his or her detriment when it was concluded.[173]

Restitutio in integrum is not available only in respect of contracts: the minor may invoke the remedy whenever he or she has suffered prejudice.[174] For example, in *Landers v Estate Landers*[175] *restitutio in integrum* was granted to a minor who had lost his inheritance through his guardian's failure to protect his interests. *Restitutio in integrum* can, however, not be invoked to set aside a marriage or escape delictual or criminal liability.[176]

A minor who misrepresented himself or herself as a major or an emancipated minor or as having the requisite consent to enter into the contract, and thereby persuaded the other party to enter into a contract with him or her may not rely on *restitutio in integrum*.[177]

Whether an emancipated minor may obtain *restitutio in integrum* is controversial. It is submitted that *restitutio in integrum* should indeed be available to an emancipated minor, because it is illogical to deny the minor the remedy simply because his or her guardian consented to his or her entering into all transactions within a particular sphere instead of just consenting to one particular transaction.[178]

Restitutio in integrum not only affords a cause of action but may also be raised as a defence, for example, if a minor is sued for performance in terms of a prejudicial contract.[179]

With the assistance of his or her guardian, the minor may apply for *restitutio in integrum* before attaining majority, or the guardian may apply on the minor's behalf. If the guardian fails to assist the minor, a *curator ad litem* may be appointed to assist the minor in the litigation.[180]

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169 See e.g. Voet 4.1.11 *et seq*; Van Leeuwen *Censura Forensis* 1.4.43.1–1.4.43.2; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Wood v Davies* 1934 CPD 250; *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA).

170 *D* 4.4.11.4–4.4.11.5; Voet 4.4.49; Grotius 3.48.11; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

171 Grotius 3.48.5; Voet 4.1.22, 4.4.36–4.4.37; *Wood v Davies* 1934 CPD 250.

172 See e.g. Voet 4.1.13, 4.4.21, 4.4.52; Van Leeuwen *Censura Forensis* 1.4.43.2; Van der Keessel *Theses Selectae* 128, 133; *Breytenbach v Frankel* 1913 AD 390; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A); *Edelstein v Edelstein* 1952 (3) SA 1 (A).

173 *Breytenbach v Frankel* 1913 AD 390.

174 Voet 4.4.14–4.4.32.

175 1933 NPD 415.

176 Voet 4.4.45.

177 Voet 4.4.43; Van Leeuwen *Censura Forensis* 1.4.43.7; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

178 See also Barratt in Barratt (ed.) *Persons and the Family* 75; Boezaart *Persons* 71; Boezaart in Boezaart (ed.) *Child Law in South Africa* 28; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 490; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; De Wet and Van Wyk 69; Van der Vyver and Joubert 153–155; Bhana and Visser 2014 *THRHR* 184. But see Spiro *Parent and Child* 251.

179 *Van der Byl & Co v Solomon* (1877) 7 Buch 25; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

180 Grotius 3.48.12.

Alternatively, the minor may await majority and then institute the action on his or her own, but in this event he or she has to consider the possibility of prescription of the claim. Prescription usually takes place three years after the date on which the cause of action arises but, in the case of a minor, it is delayed until at least a year after the minor becomes a major.[181] If, after attaining majority, the minor ratifies the contract, he or she is barred from obtaining *restitutio in integrum*.[182]

Restitutio in integrum accorded to a minor differs from other cases of restitution in that it does not release someone who has bound himself or herself as a surety for the minor.[183] Thus, if a minor's guardian has stood surety for the minor's obligations, the guardian would still have to meet those obligations.

(b) Other agreements

The principle that a minor may improve his or her position but not encumber it without the consent of his or her guardian also applies to other agreements. Thus, for example, a real agreement by which a right is transferred to a minor is valid even if the minor is unassisted,[184] but a real agreement by which a minor attempts to transfer a real right to another person without his or her guardian's assistance, is invalid. Likewise, a minor can enter into an unassisted agreement which extinguishes a debt he or she owes, but a minor cannot enter into an unassisted agreement by which another person's debt to him or her is extinguished.[185] Therefore, someone who entered into a contract with a minor cannot validly render performance in terms of the contract unless the minor is assisted by his or her guardian. If the other party to the contract does render performance, that party is not released from his or her duty to perform, but if the minor is enriched by the performance, the minor may incur liability on the ground of unjustified enrichment.[186]

If the minor performs without his or her guardian's assistance, the performance is invalid[187] and can be recovered. The reason for this rule obviously is that although performance entails an advantage for the minor in so far as his or her indebtedness is terminated, it also entails a disadvantage because the minor loses his or her right of ownership to whatever his or her performance consists of. It must, however, be borne in mind that if a minor entered into a contract with the requisite assistance but rendered performance under that contract without assistance, the minor may not recover his or her performance, for in this case the minor's guardian is taken to have consented not only to the contract but also to the minor's fulfilling the contract by rendering performance.[188]

(c) Wills

Once a minor reaches the age of 14 years, he or she may witness a will.[189] A person who is 16 years or older may make his or her own will and in it dispose of his or her property as he or she pleases.[190]

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181 Prescription Act 68 of 1969 s 13(1)(*a*). On the effect of the lowering of the age of majority on prescription, see below in this chapter.

182 Voet 4.4.44; Van Leeuwen *Censura Forensis* 1.4.43.8; *Van der Byl & Co v Solomon* (1877) 7 Buch 25; *Wolff v Solomon's Trustee* (1895) 12 SC 42; *Fenner-Solomon v Martin* 1917 CPD 22; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

183 Voet 4.4.39; Van Leeuwen *Censura Forensis* 1.4.43.10; Lee *Introduction* 48.

184 *Harvey v Reed* 1879 OFS 48; Reinecke 1964 *THRHR* 137.

185 Grotius 3.30.11; Voet 4.4.22; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8; Van der Keessel *Praelectiones* 1.8.5.

186 It must be noted that the minor's performance is invalid only in so far as it purports to extinguish the other party's debt. It may be valid in so far as it is to the minor's advantage. E.g., if something is delivered to the minor in terms of a contract of sale, delivery does not extinguish the other party's obligation to deliver, but ownership of the asset usually passes to the minor. In this regard, see Reinecke 1964 *THRHR* 133–134.

187 *D* 46.3.14.8.

188 Voet 4.4.21.

189 Wills Act s 1.

190 Wills Act s 4.

(d) Marriages and civil unions

(i) *Civil marriages*

A minor may enter into a civil marriage if he or she has the requisite consent.[191] All the guardians of the minor must consent to the marriage, unless the court orders otherwise.[192] If a guardian is absent, mentally ill or in any other way incompetent to consent, or if the minor can for any other good reason not obtain the guardian's consent, the presiding officer of the Children's Court may grant consent.[193] If a guardian or the presiding officer withholds consent, the minor may approach the High Court for consent.[194]

If the consent of the guardian(s) or the presiding officer is not obtained and the court does not authorise the marriage, the marriage is voidable. It may be set aside on the application of either

(1) the minor's parents or guardian before the minor attains majority and within six weeks from the date on which they become aware of the existence of the marriage; or

(2) the minor before he or she attains majority or within three months thereafter.[195]

If the marriage is dissolved due to lack of consent, the court may make any order with regard to the division of the matrimonial property it deems just.[196] If the marriage is not dissolved, the patrimonial consequences are the same as if the minor were of age when the marriage was entered into and any antenuptial contract in terms of which the accrual system[197] is included is deemed to be valid.[198]

All female minors below the age of 15 years and all male minors must obtain the consent of the Minister of Home Affairs in addition to obtaining their guardian(s)' consent to the marriage, unless the court authorises the marriage.[199] Because children below the age of puberty[200] cannot enter into a civil marriage at all, the Minister's power to grant consent applies only to marriages of females between the ages of 12 and 15 years and males between the ages of 14 and 18 years.[201] If ministerial consent is not obtained, the marriage is void. The Minister may, however, subsequently declare the marriage valid if the marriage is desirable and in the parties' interests and in all other respects complies with the Marriage Act 25 of 1961.[202]

A minor who has previously entered into a valid civil or customary marriage and whose marriage has been dissolved by death or divorce may enter into another civil marriage

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191 The civil marriage of a minor is discussed more fully in Heaton and Kruger *Family Law* 16–24.

192 Children's Act s 18(3)*(c)* and (5); see also Matrimonial Affairs Act 37 of 1953 s 5(1); Divorce Act 70 of 1979 s 6(3).

193 Marriage Act s 25(1).

194 Marriage Act s 25(4).

195 Marriage Act s 24A.

196 Matrimonial Property Act s 24(1).

197 The accrual system applies in some marriages out of community of property. By virtue of this system the spouses share their profit at the dissolution of the marriage. On the accrual system, see further Heaton and Kruger *Family Law* ch 7.

198 Matrimonial Property Act s 24(2).

199 Marriage Act s 26(1).

200 At common law the age of puberty is 12 years for girls and 14 years for boys.

201 Barratt in Barratt (ed.) *Persons and the Family* 63, 64; Boezaart *Persons* 86; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 836 fn 2; Heaton and Kruger *Family Law* 17; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 16; Kruger and Skelton (eds) *Persons* 129; Lee and Honoré par 41; Mahler-Coetzee in Barratt (ed.) *Persons and the Family* 82; Sinclair assisted by Heaton *Law of Marriage* 367; Van der Vyver and Joubert 172, 486–487; Van Schalkwyk 70; Visser and Potgieter *Introduction to Family Law* 51; Menge 1956 *SALJ* 450; Spiro 1960 *THRHR* 5; Van der Walt 1961 *THRHR* 119. But see Hahlo *Husband and Wife* 90; Conradie 1956 *SALJ* 190.

202 Marriage Act s 26(2).

without consent because he or she attained majority upon entering into the first marriage[203] and the dissolution of the marriage did not revive his or her minority.[204]

(ii) *Customary marriages*

A minor who wants to enter into a customary marriage needs the consent of all his or her guardians, unless the court orders otherwise.[205] If a guardian is absent, mentally ill or in any other way incompetent to consent, or if the minor can for any other good reason not obtain the guardian's consent, the presiding officer of the Children's Court may grant consent.[206] If a guardian or the presiding officer withholds consent, the minor may approach the High Court for consent.[207]

If a minor fails to obtain consent from his or her guardian(s) or the presiding officer and the court does not authorise the marriage, the marriage is voidable. It may be set aside on the application of either

(1) the minor's parents or guardian before the minor attains majority and within six weeks from the date on which they become aware of the existence of the marriage; or

(2) the minor before he or she attains majority or within three months thereafter.[208]

If the marriage is dissolved due to lack of consent, the court may make any order with regard to the division of the matrimonial property it deems just.[209] It is unclear what the patrimonial consequences are if an unassisted minor's customary marriage is not set aside.[210]

Unless the court authorises the marriage, every minor who wants to enter into a customary marriage must also obtain the written consent of the Minister of Home Affairs.[211] Ministerial consent does not release the minor from the need to comply with all the other requirements for a valid customary marriage, such as obtaining the consent of his or her guardians.[212] If ministerial consent is not obtained, the Minister may subsequently declare the marriage valid if the marriage is desirable and in the parties' interests and in all other respects complies with the Recognition of Customary Marriages Act 120 of 1998.[213] If such declaration is not obtained, the marriage is void.[214]

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203 Marriage Act s 24(2). The section refers to a "valid marriage". At the time when the Marriage Act was drafted, the legislature clearly had only a civil marriage in mind. However, because s 2 of the Recognition of Customary Marriages Act now recognises customary marriages as valid, the phrase "valid marriage" should be interpreted to apply to a valid customary marriage, too. Further, as s 6 of the Recognition of Customary Marriages Act confers "full status and capacity" on wives in customary marriages, and husbands in customary marriages always acquired adult status and capacity upon entering into a customary marriage, minors of both sexes now obtain majority status when they enter into a valid customary marriage.

204 Voet 4.4.6; *Cohen v Sytner* (1897) 14 SC 13. See also below in this chapter.

205 Recognition of Customary Marriages Act s 3(1)(*a*) read with s 18(3)(*c*)(i) of the Children's Act. The customary marriage of a minor is discussed more fully in Heaton and Kruger *Family Law* 219–220, 227–228.

206 S 3(3)(*b*) of the Recognition of Customary Marriages Act read with s 25(1) of the Marriage Act.

207 S 3(3)(*b*) of the Recognition of Customary Marriages Act read with s 25(4) of the Marriage Act.

208 S 3(5) of the Recognition of Customary Marriages Act read with s 24A of the Marriage Act.

209 Recognition of Customary Marriages Act s 8(4)(*a*) read with s 24(1) of the Matrimonial Property Act.

210 See Heaton and Kruger *Family Law* 227–228.

211 Recognition of Customary Marriages Act s 3(4)(*a*).

212 S 3(4)(*b*).

213 S 3(4)(*c*).

214 The consequences of failing to obtain the Minister's consent are not governed by the Recognition of Customary Marriages Act. However, by analogy to the position that applies in civil marriages concluded without ministerial consent, customary marriages concluded without ministerial consent should be void.

(iii) *Civil unions*

As the Civil Union Act restricts civil unions to persons who have already reached the age of 18 years,[215] a minor cannot enter into a civil union even if he or she is assisted by his or her guardian.

(e) Medical treatment, operations, HIV tests, and contraceptives[216]

A minor who is below the age of 12 years may not have medical treatment without his or her guardian's consent.[217] The same applies to an operation on a minor who is below the age of 12. The guardian's consent to medical treatment is also needed if the minor has already turned 12 but is immature and does not have the mental capacity to understand the benefits, risks and social implications of the treatment.[218] If a minor who has already turned 12 is sufficiently mature and has the mental capacity to understand the benefits, risks, social and other implications of the medical treatment, the consent of his or her guardian is not needed.[219] A minor who has already turned 12 may also consent to an operation if he or she is sufficiently mature and has the mental capacity to understand the benefits, risks, social and other implications of the operation, but in such event he or she must still be "duly assisted" by his or her guardian.[220] In the case of an operation, a minor over the age of 12 can therefore not independently give consent unless the operation in issue is a termination of pregnancy.[221]

A minor's guardian may not refuse to assist the minor in respect of an operation or withhold consent to medical treatment or an operation on the ground of religious or other beliefs, unless the guardian can show that there is a medically accepted alternative to the operation or medical treatment.[222] If the minor or his or her guardian unreasonably withholds consent, the Minister of Social Development may give consent.[223] The same applies if the guardian unreasonably refuses to assist a minor over the age of 12 in respect of an

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215 See the definition of "civil union" in s 1 of the Act.

216 On a minor's capacity to consent to medical treatment, operations, HIV treatment and contraception in terms of the Children's Act, see further Barratt in Barratt (ed.) *Persons and the Family* 65–67; Boezaart *Persons* 88–89; Bosman-Sadie, Corrie and Swanepoel *Practical Approach* 187–194; Kassan and Mahery in Boezaart (ed.) *Child Law in South Africa* 206–221; Kruger and Skelton (eds) *Persons* 131–134; Mahery, Proudlock and Jamieson *Guide to the Children's Act* 9–17; Schäfer *Child Law* 186–198; Schäfer in Clark (ed.) *Family Law Service* pars E94–E96; Sloth-Nielsen in Davel and Skelton (eds) *Commentary on the Children's Act* 7-62–7-69; Himonga and Cooke 2007 *International Journal of Children's Rights* 323; Nienaber 2008 *THRHR* 671; Strode, Slack and Essack 2010 *SAMJ* 247; Karels and Oosthuizen 2010 (2) *JJS* 90–91; Ncube and Ross 2010 *SAJBL* 67; Malherbe and Govindjee 2010 *THRHR* 61; Pieterse 2010 *THRHR* 230; Durojaye 2011 *CILSA* 1; McQuoid-Mason 2014 *SAMJ* 466; Savage-Oyekunle and Nienaber 2015 *CILSA* 98, 2015 *AHRLJ* 433, 2015 *THRHR* 363, 541; Van Rooyen, Strode and Slack 2016 *SAMJ* 451. On consent to force-feeding an anorexic minor, see Karels and Oosthuizen 2010 *JJS* 70. On consent to research on children, see Strode and Slack 2011 *SAJBL* 69; Nienaber 2013 *SAJP* 19; Strode, Toohey, Singh and Slack 2015 *SAJBL* 22; Slack and Strode 2016 *SAJBL* 35. On the question whether parents have the right to authorise medical treatment or an operation which will result in one of their children becoming a so-called "saviour sibling" for another child of theirs (the so-called "benefactor child"), see Du Plessis, Govindjee and Van der Walt 2014 *Obiter* 224.

217 S 129(1), (4) and (5).

218 S 129(4).

219 S 129(2).

220 S 129(3). The Act does not define the phrase "duly assisted". On the lack of clarity regarding the requirement of due assistance, see Slabbert 2004 (2) *PELJ* 8.

221 In terms of s 5(2) and (3) of the Choice on Termination of Pregnancy Act 92 of 1996, a pregnant minor of any age may independently consent to the termination of her pregnancy: see further ch 2 above.

222 S 129(10). On this provision, see also Malherbe and Govindjee 2010 *THRHR* 61; Du Plessis, Govindjee and Van der Walt 2014 *Obiter* 17–18.

223 S 129(7)(*a*) and (8).

operation.[224] The Minister may also give consent if the guardian is incapable of consenting, is incapable of assisting the minor, cannot readily be traced, or is deceased.[225] If the Minister, the minor or the guardian refuses or is unable to give consent, the High Court or Children's Court may give consent.[226] If the treatment or operation is necessary to preserve the minor's life or to save him or her from serious or lasting physical injury or disability and the need for the treatment or operation is so urgent that it cannot be postponed to obtain the requisite consent, the superintendent or, in the absence of the superintendent, the person who is in charge of the hospital may consent to it.[227]

A minor may undergo an HIV test only if:

(1) the test is necessary to establish whether a health worker may have contracted HIV due to contact in the course of a medical procedure with any substance from the minor's body that may transmit HIV;

(2) any other person may have contracted HIV due to contact with a substance from the minor's body that may transmit HIV, and a court has authorised the test; or

(3) the test is in the child's best interests and the necessary consent has been given for the test.[228]

If the minor has turned 12 or is below 12 years of age but is sufficiently mature to understand the benefits, risks and social implications of the test, he or she may independently consent to the test.[229] If the minor is below 12 years of age and is insufficiently mature to understand the benefits, risks and social implications of the test, the consent of his or her parent or caregiver, the provincial head of social development, or the designated child protection organisation that is arranging the minor's placement is required.[230] If the minor has no parent or caregiver and no designated child protection organisation is arranging his or her placement, the superintendent or person in charge of a hospital may consent to the test.[231] If the minor or his or her parent or caregiver is incapable of giving consent, or if the minor, parent, caregiver, provincial head or child protection organisation unreasonably withholds consent, the Children's Court may give consent.[232]

If the minor is sufficiently mature to understand the benefits, risks and social implications of the test, the test may not be performed until the minor has been properly counselled by an appropriately trained person. If the minor is sufficiently mature to understand the implications of the test result, an appropriately trained person must also provide the minor with post-test counselling.[233] If the minor's parent or caregiver knows about the test, he or she must also receive pre- and post-test counselling.[234]

If the test results show that the minor is HIV-positive, this fact may not be disclosed unless the minor gives his or her consent if he or she has turned 12 or is below 12 years of age but is sufficiently mature to understand the benefits, risks and social implications of the disclosure.[235] If the minor is below 12 years of age and insufficiently mature to understand the benefits, risks and social implications of the disclosure, the consent of his or her parent or caregiver or the designated child protection organisation that is arranging his or her

224 S 129(7)(*a*).
225 S 129(7)(*b*)–(*d*).
226 S 129(9).
227 S 129(6).
228 S 130(1).
229 S 130(2)(*a*).
230 S 130(2)(*b*)–(*d*).
231 S 130(2)(*e*).
232 S 130(2)(*f*).
233 S 132(2).
234 S 132(1) and (2).
235 S 133(2)(*a*).

placement must be obtained.[236] If the minor is below 12 years of age, insufficiently mature to understand the benefits, risks and social implications, and has no parent or caregiver and no designated child protection organisation is arranging his or her placement, the superintendent or person in charge of a hospital may consent to the disclosure.[237] If the minor or his or her parent or caregiver is incapable of giving consent, or if the minor, parent, caregiver or designated child protection organisation unreasonably withholds consent and disclosure is in the child's best interests, the Children's Court may consent to the disclosure.[238]

The Act permits disclosure of the minor's HIV-positive status without consent only if the

(1) person who makes the disclosure does so within the scope of his or her powers and duties in terms of the Children's Act or any other law;

(2) disclosure is necessary for purposes of carrying out the provisions of the Children's Act;

(3) disclosure takes place for purposes of legal proceedings; or

(4) disclosure is made in terms of a court order.[239]

Minors below the age of 12 years require the consent of their guardian to obtain contraceptives.[240] The Children's Act does not provide for those cases in which consent is withheld. However, in its capacity as upper guardian of all minors the High Court has the power to dispense with consent should the minor's best interests require this. A minor who has turned 12 may independently buy condoms and receive free condoms on request.[241] He or she may also be provided with other contraceptives on request, provided that he or she receives proper medical advice and undergoes a medical examination to determine whether there are any medical reasons why a specific contraceptive should not be provided to him or her.[242] A minor who obtains condoms, contraceptives or contraceptive advice is entitled to confidentiality in this regard.[243]

6.4.2 Capacity to hold certain offices and perform certain functions

On the ground of his or her minority a person who is below 18 years of age is incompetent to perform certain functions and to hold certain offices. For example, a minor cannot be a director of a company[244] or mutual bank.[245] Whether a minor can be the executor of a deceased estate has not been finally settled, but it is submitted that he or she cannot.[246] As emancipation does not terminate minority, an emancipated minor should be disqualified from holding these positions,[247] but a minor who has attained majority status through entering into a marriage[248] should not be disqualified.[249]

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236 S 133(2)(*b*)–(*c*).
237 S 133(2)(*d*).
238 S 133(2)(*e*).
239 S 133(1).
240 S 134(1) and (2).
241 S 134(1).
242 S 134(2).
243 S 134(3).
244 Companies Act 71 of 2008 s 69(7)(*b*).
245 Mutual Banks Act s 38(*a*).
246 See also Boezaart *Persons* 60; Cronjé *LAWSA* vol 20 part 1 *Persons* par 480; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 853–854; Kruger and Skelton (eds) *Persons* 115; Spiro *Parent and Child* 158; Van der Vyver and Joubert 170–171; Van der Vyver 1997 *SALJ* 750.
247 In *Ex parte Velkes* 1963 (3) SA 584 (C) the question of whether an emancipated minor can become a company director was left open. Emancipation is discussed below in this chapter.
248 As a person below the age of 18 years cannot enter into a civil union (Civil Union Act s 1), it is impossible to obtain majority status by concluding such a union. On a minor's inability to enter into a civil union, see further above in this chapter.
249 Barratt in Barratt (ed.) *Persons and the Family* 67; Boezaart *Persons* 60; Cronjé *LAWSA* vol 20 part 1 *Persons* par 480; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 853 fn 61; Kruger and Skelton (eds) *Persons* 115; Van der Vyver and Joubert 170.

A married parent who is younger than 18 years qualifies as his or her child's guardian,[250] but cannot be appointed as the guardian of somebody other than his or her child.[251] The same applies to an unmarried parent who is younger than 18 years and has obtained guardianship in respect of his or her child in terms of the Children's Act.[252]

A minor can act as someone's agent without the consent of his or her guardian since an agent does not bind himself or herself but instead binds his or her principal.[253]

6.4.3 Capacity to litigate

Generally speaking, a minor has limited *locus standi in iudicio* in civil proceedings. The minor's guardian may either sue or be sued on the minor's behalf or the minor may sue or be sued in his or her own name with his or her guardian's assistance.[254] As is the case in respect of capacity to act, the guardian's assistance may be given by way of ratification.[255]

If the minor does not have a guardian, a *curator ad litem* is usually appointed to assist the minor.[256] In *Vista University, Bloemfontein Campus v Student Representative Council, Vista University*[257] the High Court relied on its powers as upper guardian of all minors and itself assisted the minors in the particular litigation.

In some civil cases a minor may litigate without assistance. For example, if the High Court grants the minor *venia agendi* (that is, permission to conduct litigation) the minor is treated like a major for purposes of the particular proceedings.[258] Other exceptions relate to maintenance claims against a minor in the Maintenance Court, an application to court for consent to marry without the consent of the minor's guardian, and certain election disputes.[259] In criminal proceedings the guardian's assistance is not needed.

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250 Children's Act s 19(1) and (2) and s 20(*a*). This rule does not apply to civil union partners, for only persons who are at least 18 years of age may enter into a civil union: see above in this chapter.

251 Grotius 1.7.6; Voet 26.1.3–26.1.5; Van der Keessel *Theses Selectae* 112, 114; *Dhanabakium v Subramanian* 1943 AD 160.

252 On the parental responsibilities and rights of unmarried parents, see ch 5 above.

253 Voet 14.3.1.

254 Voet 2.4.4, 5.1.11; Grotius 1.8.4; Van Leeuwen *Rooms-Hollands-Regt* 5.3.5; Van der Keessel *Theses Selectae* 127; *Wolman v Wolman* 1963 (2) SA 452 (A); *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A). S 14 of the Children's Act entitles the minor to assistance in bringing a matter to court. On s 14, see further above in this chapter. If a minor's parent sues in his or her personal capacity for his or her own loss and in his or her representative capacity for his or her child's loss, the liable party may not set off any amount it can recover from the parent against the amount it owes to the minor: *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA).

255 See e.g. *Perkins v Danford* 1996 (2) SA 128 (C).

256 See e.g. *Van Rij v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 731 (T); *Ex parte Visser: In re Khoza* 2001 (3) SA 524 (T). In *Ex parte Oppel: In re Appointment of Curator ad Litem and Curator Bonis* [2002] 1 All SA 8 (C) (also reported as *Ex parte Oppel* 2002 (5) SA 125 (C)) the court held that if the minor's guardian is alive and available, a *curator ad litem* will be appointed in exceptional circumstances only. The court specifically referred to instances "where the guardian refuses to act, where the minor litigates against the guardian or where there is a clash of interests between that of the minor and that of the guardian" (31DE). In this case, the application for the appointment of a *curator ad litem* was a precursor to having a *curator bonis* appointed to administer a large amount of money that had been awarded to a minor. The judge in *Ex parte Oppel* was of the view that the minor's parents were obliged to administer the money. But see *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) where it was found that the decision in *Oppel* was wrong.

257 1998 (4) SA 102 (O) (also reported as *Vista University (Bloemfontein Campus) v Student Representative Campus Vista* 1998 (4) BCLR 514 (O)).

258 *Ex parte Goldman* 1960 (1) SA 89 (D).

259 On the exceptions, see Boezaart *Persons* 89–90; Boezaart in Boezaart (ed.) *Child Law in South Africa* 34; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 908 *et seq*, Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 34–35; Kruger and Skelton (eds) *Persons* 135; Schäfer *Child Law* 203; Van der Vyver and Joubert 174 *et seq*.

If a court makes a costs order against a minor, it is normally the minor who is liable. In exceptional instances the court may order the minor's guardian to pay the costs either alone or jointly and severally with the minor. Such an order may be made if the guardian instituted or defended the litigation frivolously or recklessly or allowed the minor to do so, or if the guardian acted in a *mala fide*, unreasonable or negligent manner in respect of instituting or defending the litigation.[260]

6.4.4 Capacity to incur delictual and criminal liability

To incur delictual or criminal liability the minor must be accountable. A person is accountable only if he or she has the mental ability to distinguish right from wrong and to act accordingly.[261]

In terms of the common law, it is rebuttably presumed that minors between the ages of seven years and puberty are not accountable for their delicts.[262] (The age of puberty is 14 years for boys and 12 years for girls.) Boys between 14 and 18 years of age and girls between 12 and 18 years of age are rebuttably presumed to be delictually accountable.[263] In other words, they are considered accountable until the opposite is proved. The different ages at which boys and girls are presumed to acquire the capacity to be delictually accountable may well amount to unjustifiable sex discrimination.[264]

If the minor's guardian uses the minor as his or her agent or instrument or negligently fails to prevent the minor from causing damage, the guardian may be held personally liable for damage the minor causes.[265] If the guardian employs the minor, he or she can also incur vicarious liability for delicts the minor commits in the course of his or her employment.[266]

A minor's capacity to be held criminally accountable is governed by the Child Justice Act 75 of 2008. In terms of the Act, the minimum age for criminal accountability is 10 years; in other words, a minor below the age of 10 years cannot be held accountable for any crime he or she commits.[267] A child between 10 and 14 years of age is presumed to be criminally unaccountable.[268] Such a child has criminal capacity only if the state proves beyond reasonable doubt that when the alleged crime was committed, the child had the capacity to understand the difference between right and wrong and to act in accordance with that understanding.[269] A minor over the age of 14 is criminally accountable in the same way as an adult.[270]

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260 See e.g. *Grobler v Potgieter* 1954 (2) SA 188 (O); *Ex parte Hodgert* 1955 (1) SA 371 (D); *Ex parte Bloy* 1984 (2) SA 410 (D); *Tshona v Principal, Victoria Girls High School* 2007 (5) SA 66 (E), Heaton *Casebook on the Law of Persons* case **[35]**.

261 See e.g. *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

262 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

263 On the delictual accountability of children, see further Barratt in Barratt (ed.) *Persons and the Family* 69–70; Boezaart *Persons* 92–93; Kruger and Skelton (eds) *Persons* 137–138; Schäfer *Child Law* 206; Davel 2001 *De Jure* 604; Labuschagne 2003 *De Jure* 147; Jansen and Neethling 2017 *THRHR* 474.

264 See the *obiter* remark in *Eskom Holdings Ltd v Hendriks* 2005 (5) SA 503 (SCA) 511G–H. S 9(3) of the Constitution provides that nobody may be unfairly discriminated against on the ground of sex.

265 *Wessels v Pretorius* [2008] 1 All SA 131 (SCA).

266 *De Beer v Sergeant* 1976 (1) SA 246 (T). On the arguments for and against the imposition of vicarious liability on parents whose children cause damage, see Potgieter 2011 *Obiter* 189.

267 S 7(1) and (3).

268 S 7(2) and (3).

269 S 11(1).

270 On the criminal accountability of children, see further Barratt in Barratt (ed.) *Persons and the Family* 70; Boezaart *Persons* 94; Kruger and Skelton (eds) *Persons* 136–137; Schäfer *Child Law* 206–210.

6.5 Termination of minority[271]

6.5.1 Attainment of the prescribed age

On 1 July 2007, section 17 of the Children's Act lowered the age of majority from 21 to 18 years of age.[272] Because the Act does not operate retroactively, the lowering of the age of majority did not retroactively affect rights that vested in or accrued to a person who was below the age of 21 years before 1 July 2007.

Thus, for example, if a person who was below the age of 21 years obtained a claim before 1 July 2007, he or she is treated as a minor for the purposes of establishing whether extinctive prescription has taken place in respect of the claim, despite the fact that the Children's Act lowered the age of majority. In terms of the Prescription Act 68 of 1969, prescription usually takes place three years after the date on which the claim arises but, in the case of a minor, completion of prescription is delayed until at least a year after the minor becomes a major.[273] Prior to 1 July 2007, this meant that completion of the prescription period was postponed until at least one year after the minor turned 21. In *Malcolm v Premier, Western Cape Government NO*[274] the Supreme Court of Appeal held that, if anything, the fact that the Children's Act is silent on the effect of the lowering of the age of majority on prescription, points to the change in the law operating only in cases arising after 1 July 2007. The Supreme Court of Appeal pointed out that persons who were over the age of 18 when section 17 came into operation, attained majority only on 1 July 2007 even though they had actually turned 18 before that date. For this reason, contracts they had entered into without the required assistance before 1 July 2007 did not automatically become enforceable against them on 1 July 2007. Nor did marriages they had entered into without the requisite assistance before that date suddenly become valid. There was no reason why the position in relation to prescription should be any different. The court further held that hardship would arise if the lowering of the age of majority were retroactively to affect the rule regarding extinctive prescription of minors' claims. The court therefore concluded that lowering of the age of majority did not affect periods of prescription that were running before section 17 came into operation.[275] In *APDOL v Road Accident Fund*[276] the High Court had earlier arrived at a similar conclusion in respect of prescription of a minor's claim in terms of the Road Accident Fund Act 56 of 1996. In terms of this Act, too, prescription of a claim usually takes place three years after the date on which the claim arises.[277] However, in the case of a claim by a minor, prescription only starts to run once the minor becomes a major.[278] The court held that the lowering of the age of majority did not affect any right a minor acquired before the age of majority was lowered to 18 years.

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271 On the distinction between the Afrikaans concepts *meerderjarigheid* (majority) and *mondigheid* (for which there is no English translation), see *Meyer v The Master* 1935 SWA 3, Heaton *Casebook on the Law of Persons* case **[36]**. *Meerderjarigheid* refers to a specific age that one must reach and is one way of becoming *mondig*, but there are also other ways in which it can take place, e.g. by marriage. I.e., all majors are *mondig* but not all *mondiges* are majors.

272 Children's Act s 17. 1 July 2007 is the date on which the first batch of sections of the Act, which included s 17, came into operation: Procl 13 *GG* 30030 of 29 June 2007.

273 S 13(1)(*a*).

274 [2014] 2 All SA 251 (SCA), 2014 (3) SA 177 (SCA), Heaton *Casebook on the Law of Persons* case **[37]**.

275 See also *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD), where the KwaZulu-Natal division of the High Court had earlier arrived at the same conclusion via a different route. An appeal against the order in *Shange* was dismissed by the Supreme Court of Appeal on the ground that the High Court had unnecessarily investigated the effect of s 17 of the Children's Act on the running of prescription in respect of the particular respondent's claim, because the facts showed that the ordinary three-year period of prescription had not yet expired.

276 2013 (2) SA 287 (GNP).

277 S 23(1).

278 S 23(2).

Majority ensues at the beginning of the day of the person's 18th birthday, unless it is to his or her advantage to prolong minority until the precise moment that corresponds to the time of his or her birth.[279] It is doubted whether the exception is ever applied in practice.

6.5.2 Marriage or a civil union

A person who enters into a valid civil or customary marriage before turning 18 thereby becomes a major for all purposes. If the marriage is dissolved by death or divorce before the person reaches the age of 18 years, his or her minority does not revive.[280] A void marriage does not terminate minority, and the annulment of a voidable marriage restores a minor's limited capacity with retroactive effect.[281]

The Civil Union Act restricts civil unions to persons who have already reached the age of 18 years.[282] Thus a minor cannot acquire majority status by entering into a civil union.

6.5.3 *Venia aetatis* and release from tutelage

At common law the sovereign (that is, the head of state) could grant a minor a concession to act as a major. This was known as *venia aetatis*. The effect of *venia aetatis* was to make the minor a major in the eyes of the law with the exception that he or she could not alienate immovable property or burden it with a mortgage unless this capacity was expressly conferred.[283] In South African law *venia aetatis* was granted in the Free State, where it was governed by statute and granted by the State President by proclamation in the *Government Gazette* after the Supreme Court had recommended it.[284] Although the legislature has not repealed *venia aetatis* and our courts have not expressly decided whether *venia aetatis* is obsolete, it is clear that no administrative machinery has existed for dealing with it for some time.[285] It is therefore submitted that *venia aetatis* can no longer be granted.[286]

In the past, the Cape courts were willing to grant an order releasing a minor from tutelage.[287] Even though such an order had more or less the same practical effect as *venia aetatis*, it was held that the court was actually merely emancipating the minor in its capacity as upper guardian of all minors.[288] Today, in its capacity as upper guardian of all minors, the High Court might still be willing to release a minor from all or some of the parental responsibilities and rights his or her parents have in respect of him or her. In this sense, so-called "release from tutelage" might still be possible.[289] It has to be borne in mind though that section 28 of the Children's Act empowers the High Court, a Regional Court dealing with a divorce matter, and the Children's Court within whose area of jurisdiction the child ordinarily resides[290] to terminate, suspend or circumscribe a person's parental responsibilities and rights. With the court's permission, an application for such termination, suspension

279 Voet 4.4.1; Grotius 3.48.9; Van Leeuwen *Censura Forensis* 1.1.8.4–1.1.8.5, 1.4.43.11–1.4.43.12.
280 Voet 4.4.6; *Cohen v Sytner* (1897) 14 SC 13.
281 *Berning v Berning* 1942 1 PH B26 (W). On void and voidable marriages, see Heaton and Kruger *Family Law* ch 4.
282 See the definition of "civil union" in s 1 of the Act.
283 Voet 4.4.5; Van Leeuwen *Censura Forensis* 1.1.18.8, *Rooms-Hollands-Regt* 1.16.11; Grotius 1.10.3.
284 Ch 89 Law Book of the Orange River Colony 1901.
285 Cronjé *LAWSA* vol 20 part 1 *Persons* par 485; De Wet and Van Wyk 67 fn 67; Hahlo and Kahn *South Africa* 363; Coertze 1937 *THRHR* 195.
286 See also Barratt in Barratt (ed.) *Persons and the Family* 72; Boezaart *Persons* 95; Kruger and Skelton (eds) *Persons* 139; Schäfer *Child Law* 21; Boezaart 2008 *De Jure* 246.
287 See e.g. *In re Cachet* (1898) 15 SC 5; *Ex parte Estate Van Schalkwyk* 1927 CPD 268; *Ex parte Curling* 1952 1 PH M13 (C); *Ex parte Van den Hever* 1969 (3) SA 96 (E), Heaton *Casebook on the Law of Persons* case [38].
288 *Ex parte Van den Hever* 1969 (3) SA 96 (E) 99CD. See also Spiro *Parent and Child* 249. For criticism of the view that the court emancipated the minor, see Zeffertt 1969 *SALJ* 407 *et seq.* See further Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 468.
289 But see Barratt in Barratt (ed.) *Persons and the Family* 72.
290 S 28(1) read with s 29(1).

or circumscription may be made by the child in respect of whom the parental responsibilities and rights operate.[291] In future, the judicial power embodied in section 28 may well, in practice, replace "release from tutelage" (should the latter mechanism still exist in our law).[292]

6.5.4 Emancipation

A minor is emancipated if his or her guardian grants him or her freedom independently to enter into contracts.[293] This occurs, for example, where the minor participates in a commercial enterprise as an economically independent person. Emancipation can be compared to the situation where a minor performs a valid juristic act with the assistance of his or her guardian. In the latter instance the guardian consents to a specific act, whereas in the case of emancipation the guardian consents to a range of juristic acts falling within a particular sphere. Whenever such consent is given the minor incurs liability just like a major.

Either parent may emancipate the child, provided that the parent has guardianship of the child.[294] Whether a minor is emancipated if one guardian emancipates the minor while the other refuses to allow the minor to be emancipated is unclear. If a minor has no parents, the minor's legal guardian may emancipate the minor.[295]

Emancipation can only be effected by express or implied consent. Mere carelessness on the part of the guardian does not result in the minor's emancipation.[296]

Whether or not a minor has been emancipated is a question of fact, which the court must decide upon after considering all the circumstances of the case. That the minor lives on his or her own and manages his or her own business are mere factual details which, together with others such as the minor's age, the relationship between the minor and the guardian, the nature of the minor's occupation and the length of time for which the occupation has been carried on, help to establish whether emancipation has in fact taken place.[297] If the minor lives with his or her guardian rather than on his or her own, stronger evidence will, however, be required to prove emancipation.[298] The *onus* of proving emancipation rests upon the person who alleges that it has taken place.[299]

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291 S 28(3)*(c)*. On termination, suspension and circumscription of parental responsibilities and rights in terms of s 28, see further ch 5 above.

292 See also Boezaart *Persons* 96.

293 See, in general, *Cairncross v De Vos* (1876) 6 Buch 5; *Steenkamp v Kamfer* 1914 CPD 877; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Pleat v Van Staden* 1921 OPD 91; *Ambaker v African Meat Co* 1927 CPD 326; *Ochberg v Ochberg's Estate* 1941 CPD 15; *Ahmed v Coovadia* 1944 TPD 364; *Dickens v Daley* 1956 (2) SA 11 (N), Heaton *Casebook on the Law of Persons* case **[39]**; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); Barratt in Barratt (ed.) *Persons and the Family* 72–75; Boezaart *Persons* 79–83; Boezaart in Boezaart (ed.) *Child Law in South Africa* 26–28; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 473 *et seq*; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; De Wet and Van Wyk 64–66; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 27–30; Kruger and Skelton (eds) *Persons* 140–141; Schäfer *Child Law* 21–22; Schäfer in Clark (ed.) *Family Law Service* par E24; Spiro *Parent and Child* 249 *et seq*; Van der Vyver and Joubert 151 *et seq*; *Wille's Principles* 191–193; Steyn 1927 *SALJ* 313.

294 Children's Act s 18(4). On the ways in which a parent can acquire guardianship, see ch 5 above.

295 *Le Grange v Mostert* (1909) 26 SC 321; *Pleat v Van Staden* 1921 OPD 91.

296 See *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745H, Heaton *Casebook on the Law of Persons* case **[41]** where Margo J says: "There is no justification for depriving a minor of the law's protection merely because his parents have failed in their duties and left him to face life alone and unassisted". See also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O), Heaton *Casebook on the Law of Persons* case **[42]**.

297 *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Pleat v Van Staden* 1921 OPD 91; *Ahmed v Coovadia* 1944 TPD 364; *Dickens v Daley* 1956 (2) SA 11 (N).

298 *Pleat v Van Staden* 1921 OPD 91; *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252.

299 *Ochberg v Ochberg's Estate* 1941 CPD 15; *Sesing v Minister of Police* 1978 (4) SA 742 (W); *Watson v Koen h/a BMO* 1994 (2) SA 489 (O).

It is unclear whether a guardian who emancipated a minor may later revoke the emancipation. *Obiter dicta* in *Cohen v Sytner*[300] and *Landmann v Mienie*[301] support the view that emancipation is irrevocable. The better view is that the guardian is entitled to revoke the emancipation.[302]

The question of the effect of emancipation on the minor's capacity to act has not been authoritatively decided. The issue is whether emancipation applies only to transactions in connection with, for example, the minor's business, or whether the minor may act beyond the scope of that business. Some cases are authority for the view that emancipation gives the minor capacity to act in respect of all contracts,[303] except that the minor may not alienate or encumber immovable property or marry without his or her guardian's consent.[304] In other cases it was held that the minor is emancipated only with regard to contracts in connection with his or her particular business.[305] It seems, however, that in this respect the courts have confused two common-law institutions, namely tacit emancipation and general authority. At common law, tacit emancipation terminated minority,[306] while general authority was "no more than advance consent to enter into transactions of a certain kind, had no effect on the parental power and could be revoked at will".[307]

Be that as it may, it is submitted that as far as modern practice is concerned, the degree of legal independence a minor has acquired is a question of fact that depends on all the circumstances of the case. If the minor has been given "complete freedom of action with regard to his mode of living and earning his livelihood",[308] the minor is emancipated for all purposes except alienation or encumbrance of immovable property and marriage. In contrast, the minor's capacity to act is restricted to matters connected with his or her business if his or her guardian has only emancipated him or her for purposes of that particular business without otherwise relinquishing parental responsibilities and rights.[309]

It was submitted above in this chapter that since *restitutio in integrum* is available to a minor who concluded a prejudicial contract with his or her guardian's consent, there is no reason why it should not also be available to an emancipated minor.

The courts seem to assume that an emancipated minor has *locus standi in iudicio*.[310] However, it is doubted whether this assumption is correct. A guardian who consents to a minor's

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300 (1897) 14 SC 13.

301 1944 OPD 59.

302 *Ex parte Keeve* 1929 OPD 19; Barratt in Barratt (ed.) *Persons and the Family* 74; Boezaart *Persons* 81, 90; Boezaart in Boezaart (ed.) *Child Law in South Africa* 28; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; Donald-son *Minors* 80; Schäfer in Clark (ed.) *Family Law Service* par E24; Spiro *Parent and Child* 250; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 29; Kruger and Skelton (eds) *Persons* 140; Van der Vyver and Joubert 153, 155; *Wille's Principles* 193. See further Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 487.

303 *Cairncross v De Vos* (1876) 6 Buch 5; *Nangle v Mitchell* (1904) 18 EDC 56; *Bosch v Titley* 1908 ORC 27; *Dickens v Daley* 1956 (2) SA 11 (N). See also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 493F–G.

304 *Ex parte Van den Hever* 1969 (3) SA 96 (E).

305 *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *Ambaker v African Meat Co* 1927 CPD 326; *Ochberg v Ochberg's Estate* 1941 CPD 15; *Ahmed v Coovadia* 1944 TPD 364. On the distinction between absolute and relative emancipation, see also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Sesing v Minister of Police* 1978 (4) SA 742 (W).

306 Voet 1.7.11–1.7.15; Van der Keessel *Theses Selectae* 107, 110, 161; Grotius 1.6.4; Van Leeuwen *Censura Forensis* 1.1.9.9–1.1.9.16, *Rooms-Hollands-Regt* 1.13. 4–1.13.6.

307 Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 476; see further Steyn 1927 *SALJ* 313 *et seq*; Conradie 1946 *SALJ* 25 *et seq*. See also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Sesing v Minister of Police* 1978 (4) SA 742 (W).

308 *Dickens v Daley* 1956 (2) SA 11 (N) 16G.

309 Hahlo and Kahn *South Africa* 365, who refer to relinquishing the reins of "paternal power".

310 See e.g. *Cairncross v De Vos* (1876) 6 Buch 5; *Pienaar v Godden* (1893) 10 SC 129; *Bosch v Titley* 1908 ORC 27; *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 (2) SA 11 (N). The question of whether emancipation confers *locus standi in iudicio* on the minor came before the

continued

entering into a specific individual transaction does not automatically also consent to the minor's engaging in litigation regarding that transaction. It therefore seems inaccurate to assume that a minor who has been emancipated automatically has *locus standi in iudicio* in respect of all matters falling within the sphere of the transactions to which his or her emancipation relates.[311]

Whether the rules regarding emancipation will remain relevant remains to be seen, because the lowering of the age of majority will probably reduce the number of cases where emancipation is at issue.[312]

court in *Ahmed v Coovadia* 1944 TPD 364 and *Sesing v Minister of Police* 1978 (4) SA 742 (W), but on the facts of these cases it was unnecessary to decide the question.

311 See also Boezaart *Persons* 81–82, 90; Cockrell in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 910 fn 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 29; Kruger and Skelton (eds) *Persons* 141; Van der Vyver and Joubert 155; Boezaart and De Bruin 2011 *De Jure* 427.

312 See also Boezaart *Persons* 83; Heaton in Sutherland (ed.) *Future of Child and Family Law* 404.

7

MENTAL ILLNESS

7.1 Introduction

The capacity to enter into legal transactions and to litigate independently is very closely related to a person's mental condition. For this reason the law precludes a person from participating in legal interaction independently if he or she is mentally ill to such a degree that he or she cannot understand the nature, purport and consequences of his or her acts.[1] The law attaches no consequences whatsoever to a mentally ill person's expressions of will. Thus a mentally ill person has no capacity to act or litigate.[2] The object of this restriction is not to punish the mentally ill person but to protect him or her from exploitation.

7.2 Definition

At common law, mentally ill persons, as a class, were confined to *furiosi, dementes* or *lunatici.*[3] These terms clearly relate to persons who are so bereft of their senses that they cannot grasp the consequences of their acts and cannot make rational decisions at all.

In modern law the courts ascribe a much wider meaning to mental illness. In *Pheasant v Warne*[4] Chief Justice Innes held that the test was whether the person's "mind was such that he could understand and appreciate the transaction into which he purported to enter". In *Lange v Lange*[5] the Appellate Division (now the Supreme Court of Appeal) held that a person is mentally ill not only if he or she cannot understand the nature of the transaction in question, but also if he or she does understand the nature and consequences of his or her juristic acts but is motivated or influenced by delusions caused by a mental illness.[6] In this case, a man had married while suffering from a mental condition which *inter alia* caused him to hear imaginary voices. Although at the time of the wedding the man had understood the nature of the juristic act, the court held that the marriage should be declared null and void on account of his mental illness.

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1 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; *Pheasant v Warne* 1922 AD 481; *Lange v Lange* 1945 AD 332; *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A), Heaton *Casebook on the Law of Persons* case **[45]**; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA); *Judin v Wedgwood* 2003 (5) SA 472 (W), Heaton *Casebook on the Law of Persons* case **[46]**; *Hardie v Jansen* (unreported, WCC case no 19339/2014, 30 July 2016).

2 On mental capacity as an element of the capacity to make a will, see e.g. De Waal et al *LAWSA* vol 31 *Wills and Succession* par 273 fns 4 and 5; Du Toit 2005 *SALJ* 661.

3 See e.g. Voet 27.10.3.

4 1922 AD 481 488.

5 1945 AD 332, Heaton *Casebook on the Law of Persons* case **[43]**.

6 See also *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669, Heaton *Casebook on the Law of Persons* case **[44]**; *Pheasant v Warne* 1922 AD 481; *Estate Rehne v Rehne* 1930 OPD 80; *Levin v Mechanich* 1931 EDL 32; *Uys v Uys* 1953 (2) SA 1 (E); Du Toit 2005 *SALJ* 663–667.

7.3 Proving mental illness

Whether or not a person was mentally ill at a specific moment is a question of fact which must be determined on a preponderance of probabilities.[7] It is the person's mental capacity at the time of the conclusion of the transaction that is at issue.

Medical evidence is usually crucial in proving mental illness. The court must, however, make its own finding after considering all the evidence and is not bound even by the unanimous opinion of psychiatrists. As judges are not experts in the psychiatric field, a court will not lightly reject the opinions of expert witnesses.[8] It will only do so if, in its view, the specialists have based their opinion upon inadequate knowledge of the relevant facts or have ignored such facts.[9]

7.4 Legal status of a mentally ill person

The statutory measures relating to mental health care and the certification and administration of a mentally ill person's estate must be clearly distinguished from the legal principles governing the person's legal status. In general, a mentally ill person's status is determined by common-law principles as interpreted and extended by the courts.[10] However, as is explained below in this chapter, section 39(1) of the Consumer Protection Act 68 of 2008 adds a specific rule in connection with agreements that fall within the ambit of this Act.

The measures relating to mental health care and the certification and administration of a mentally ill person's estate are contained in the Mental Health Care Act 17 of 2002. The Act is discussed below in this chapter. We first consider the person's legal status.

In so far as a mentally ill person's status is concerned it was pointed out above that the person has no capacity to act or *locus standi in iudicio*. Consequently, a mentally ill person cannot enter into legal transactions or litigate even with the assistance of his or her curator; the curator must conclude transactions and sue on behalf of the mentally ill person.[11] From this it follows that a mentally ill person, unlike a minor, cannot enter into transactions, even if he or she acquires only rights and the other party incurs only duties.[12] Any transaction a *de facto* mentally ill person enters into is void and cannot be ratified.[13] The transaction remains void even if the person dealing with the mentally ill person was unaware of the mental illness.[14] A *bona fide* third party can therefore not insist on the agreement being carried out but may have an action based on unjustified enrichment[15] because enrichment liability is not based on contract and capacity to act. A mentally ill person can also be liable on the basis of *negotiorum gestio*.[16]

In terms of the common law, a judicial declaration that a person is mentally ill (that is, certification) and the appointment of a curator to the person do not, as such, affect the

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7 *Lange v Lange* 1945 AD 332.
8 See e.g. *S v McBride* 1979 (4) SA 313 (W).
9 See e.g. *S v Kavin* 1978 (2) SA 731 (W). See further Du Toit 2005 *SALJ* 661.
10 The common-law restrictions on a mentally ill person's status are not unconstitutional: Cockrell *Bill of Rights Compendium* par 3E31; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 105 fn 3.
11 There are certain acts a curator cannot perform on behalf of a mentally ill person: see below in this chapter.
12 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423.
13 *Inst* 3.19.8; *D* 44.7.1.12, 50.17.5; Grotius 3.1.19; Voet 27.10.3; Van Leeuwen *Rooms-Hollands-Regt* 2.7.8; *Pheasant v Warne* 1922 AD 481; *Lange v Lange* 1945 AD 332; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C), Heaton *Casebook on the Law of Persons* case **[50]**.
14 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423.
15 Grotius 3.30.3; Van Leeuwen *Censura Forensis* 1.4.3.2; *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; Cronjé *LAWSA* vol 20 part 1 *Persons* par 487; De Vos 96, 220; Du Plessis 85; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 111; Olivier and Denson in Barratt (ed.) *Persons and the Family* 96; *Wille's Principles* 384. But see Van der Vyver and Joubert 332.
16 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; Cronjé *LAWSA* vol 20 part 1 *Persons* par 487; Du Plessis 85; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 111; *Wille's Principles* 384.

person's liability and capacity to act.[17] In other words, someone who has not been certified does not have capacity to act if he or she is in fact mentally ill when the transaction is entered into, and a person who has been certified has capacity to act if he or she is in fact not mentally ill at the time the juristic act is performed. The legal position is thus determined by whether or not the person was actually mentally ill at a specific moment.[18] Certification is important only as far as the *onus* of proof is concerned. In the case of an uncertified person the *onus* of proof is on the party alleging that the person was mentally ill at the time the transaction was concluded, because it is ordinarily presumed that everyone is sane.[19] In contrast, in the case of a certified person the *onus* is on the party alleging that the person was sane at the conclusion of the transaction, because it is rebuttably presumed that a certified person is mentally ill.[20] A juristic act that is performed during a *lucidum intervallum* (that is, a lucid interval) by a person who has been declared mentally ill is valid and enforceable.[21]

Section 39(1)(*a*) of the Consumer Protection Act creates a different rule with regard to transactions governed by the Act.[22] It provides that an agreement to enter into a transaction for the supply of any goods or services and an agreement for the supply of any goods or services to a consumer[23] "is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order".[24] Thus, this section renders all such agreements – even those which the person enters into during a *lucidum intervallum* – void if the supplier knew or could reasonably have determined that the consumer has been declared mentally ill. This rule, which obviously has the objective of protecting the mentally ill, renders all persons who have been declared mentally ill incapable of entering into agreements with a supplier who knows or could reasonably have established that the person has been declared mentally ill, and this incapacity operates regardless of the *de facto* mental condition of the person at the time of the particular agreement. In laying down this restriction, the section violates the right to equality and the right to dignity of persons who have been declared mentally ill.[25] One wonders whether the extent of this limitation is not too broad to render it justifiable in terms of section 36 of the Constitution since it does not provide for any exception to the rule that the agreement is void – not even if the agreement is very advantageous to the consumer.

A marriage or civil union is not automatically dissolved by the mental illness of one of the spouses or civil union partners.[26] However, in terms of the Divorce Act 70 of 1979,[27] mental illness for which there is no reasonable prospect of a cure is a ground for divorce. If a spouse or civil union partner's mental illness results in the irretrievable breakdown of the marriage or civil union, a divorce may also be sought on this ground.[28]

In a marriage or civil union in community of property, the court may suspend the power of a mentally ill spouse or civil union partner to deal with the joint estate for a definite or indefinite period if suspension is essential for the protection of the interest of the other

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17 Certification is discussed below in this chapter.

18 Voet 27.10.4; *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669; *Pienaar v Pienaar's Curator* 1930 OPD 171.

19 *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13; *De Villiers v Espach* 1958 (3) SA 91 (T).

20 *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669; *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13; *Levin v Mechanich* 1931 EDL 32.

21 See e.g. *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669.

22 On the transactions to which the Act applies, see ch 6 fn 71.

23 On the definition of "consumer", see ch 6 fn 72 above.

24 On the definition of a "supplier", see ch 6 fn 71 above.

25 Ss 9 and 10 of the Constitution of the Republic of South Africa, 1996 protect the right to equality and the right to dignity.

26 Voet 23.2.48; *Barnes v Hayward* 1944 CPD 203 read with s 13(2) of the Civil Union Act 17 of 2006.

27 Divorce Act s 5(1) read with s 13(2) of the Civil Union Act.

28 S 4. On the grounds for divorce, see further Heaton and Kruger *Family Law* ch 11.

spouse or civil union partner in the joint estate.[29] At common law, a spouse's mental illness was not a sufficient reason for ordering *boedelscheiding*.[30] However, in terms of the Matrimonial Property Act 88 of 1984, the immediate division of the joint estate may be ordered if the sane spouse or civil union partner satisfies the court that his or her interest in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse or civil union partner, and that no other person will be prejudiced by the division.[31]

In a marriage or civil union out of community of property which is subject to the accrual system, the sane spouse or civil union partner may ask the court to make an order for the immediate division of the accrual. The order will be made if the applicant satisfies the court that the conduct or proposed conduct of the other spouse or civil union partner seriously prejudices or will probably seriously prejudice the applicant's right to share in the accrual of the estate of the other spouse or civil union partner at the dissolution of the marriage or civil union, and that no other person will be prejudiced by the order.[32]

A parent's mental illness does not automatically terminate his or her parental responsibilities and rights.[33] Exercising its common-law authority as upper guardian of all minors or its various statutory powers, the court may, however, make an appropriate order in respect of any or all of the elements of the parent's responsibilities and rights if this is in the best interests of his or her child.[34]

The running of prescription against a person cannot be completed while he or she is mentally ill.[35]

There are numerous offices a mentally ill person cannot hold.[36]

Generally speaking, fault in the form of intention or negligence is a requirement for criminal or civil liability. As a mentally ill person is *doli* and *culpae incapax*, he or she is not responsible for his or her crimes and delicts.[37]

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29 Matrimonial Property Act 88 of 1984 s 16(2). In those cases where s 15 of the Matrimonial Property Act requires the consent of both spouses or civil union partners for a particular transaction, the sane spouse or civil union partner may also, in terms of s 16(1) of the Act, ask the court to dispense with the consent of the mentally ill spouse or civil union partner on the ground that consent cannot be obtained and there is good reason to dispense with it. To avoid having repeatedly to invoke s 16(1) it would be advisable to apply for complete suspension of the powers of the mentally ill spouse or civil union partner in terms of s 16(2). On ss 15 and 16 of the Matrimonial Property Act, see further Heaton and Kruger *Family Law* 71–78.

30 *Ex parte Dixie* 1950 (4) SA 748 (W).

31 S 20(1). The court is also authorised to order that community of property be replaced by another matrimonial property system: s 20(2). On s 20, see further Heaton and Kruger *Family Law* 78–79.

32 Matrimonial Property Act s 8(1). The court may also order that the accrual system be replaced by another matrimonial property system: s 8(2). On s 8, see further Heaton and Kruger *Family Law* 99–100.

33 Voet 1.7.13; *Ex parte Human* 1948 (1) SA 1022 (O); *Ex parte Powrie* 1963 (1) SA 299 (W).

34 Parental responsibilities and rights and court interference with parental responsibilities and rights are discussed in Heaton and Kruger *Family Law* ch 23. See also ch 5 above, where the parental responsibilities and rights of unmarried parents are discussed.

35 Prescription Act 68 of 1969 ss 3(1)(*a*), 13(1)(*a*). In *Gqamane v The Multilateral Motor Vehicle Accidents Fund* [1999] 3 All SA 683 (SE) it was held that, for purposes of prescription, an unconscious person is considered to be of unsound mind and thus falls within the ambit of s 13 of the Prescription Act. In terms of the common law, prescription does not run against a person who suffers from a disability, which includes mental illness: *Road Accident Fund v Smith* [1998] 4 All SA 429 (SCA). The application of the common-law rule has, however, been limited or excluded by various Acts, including the Prescription Act.

36 See Boezaart *Persons* 126–127; Kruger and Skelton (eds) *Persons* 165; Olivier and Denson in Barratt (ed.) *Persons and the Family* 97; Van der Vyver and Joubert 335–336.

37 D 9.2.5.2; Voet 27.10.3; Van Leeuwen *Censura Forensis* 1.4.3.2, *Rooms-Hollands-Regt* 4.2.2, 4.32.6; *R v Holliday* 1924 AD 250. On a mentally ill person's capacity to incur delictual and criminal liability, see further Criminal Procedure Act 51 of 1977 ss 78 and 79; Boezaart *Persons* 129–130; Burchell ch 20; De Wet 113–121; Hiemstra ch 13; Kruger *Bill of Rights Compendium* pars 3EB13–3EB14; Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 250–256; Kruger and Skelton (eds) *Persons* 168–169; Loubser and Midgley (eds) *Delict* 107; Olivier and Denson in Barratt (ed.) *Persons and the Family* 101; Van der Vyver and Joubert 336–348; *Wille's Principles* 384.

7.5 Appointment of a curator[38]

In terms of our common law, the High Court may appoint a *curator bonis* to look after a mentally ill person's property and to supplement his or her lack of capacity to act.[39] In terms of the Mental Health Care Act, the court also has a statutory power to appoint an administrator for the care and administration of the property of a mentally ill person or a person with severe or profound intellectual disability. This statutory power is discussed below in this chapter.

It is important to note that the mere fact that a person has been declared mentally ill and that a curator has been appointed to administer his or her estate does not mean that he or she loses all capacity to act. In *Pienaar v Pienaar's Curator*[40] Judge President De Villiers stated:

> The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent to which he may *de facto* be capable, mentally and physically, of so doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent to which such assistance is from day to day, in varying degrees, necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contracts whenever he is mentally capable of doing so.

Acts that are considered to be of a very personal nature cannot be performed by a curator. For example, a curator has no *locus standi* to institute an action for divorce on behalf of a mentally ill person.[41] Nor can a curator make a will[42] or exercise parental responsibilities and rights on behalf of a mentally ill person.[43]

In legal proceedings a mentally ill person must be represented by a *curator ad litem*[44] because the law denies *locus standi in iudicio* to someone who is unable to understand the proceedings.[45]

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38 On curators generally, see Boezaart *Persons* 152–160; Heaton and Kruger *Family Law* ch 24; Kruger and Skelton (eds) *Persons* 150–154; Olivier and Denson in Barratt (ed.) *Persons and the Family* 98–100; South African Law Commission *Incapable Adults Issue Paper 18* pars 3–5; *Wille's Principles* 376–381; Neumann June 1998 *De Rebus* 62.

39 *Minister of the Interior v Cowley* 1955 (1) SA 307 (N). Rule 57 of the Uniform Rules of Court governs applications to the High Court for an order declaring someone to be "of unsound mind and as such incapable of managing his affairs". The application for appointment of a curator to a mentally ill person is brought in terms of this rule. On applications in terms of rule 57, see further *Judin v Wedgwood* 2003 (5) SA 472 (W); *Ex parte Futter, In re Walter v Road Accident Fund* (unreported, ECPE case no 2422/2008, 17 August 2012); *Modiba obo Ruca, In re Ruca v RAF* (unreported, GPPHC case no 12610/2013 and case no 73012/13, 27 January 2014); *Ferguson v Road Accident Fund* (unreported, NWHC case no 1073/2012, 7 July 2014); Boezaart *Persons* 158–160; Catto in Heaton (ed.) *Law of Divorce* 502–504; Kruger *Bill of Rights Compendium* par 3EB20; Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 294–298; Kruger in Clark (ed.) *Family Law Service* par F13; *Wille's Principles* 830–831; Letzler and Vergano June 2014 *De Rebus* 30. On the functions, powers and duties of a *curator bonis*, see Administration of Estates Act 66 of 1965 ch IV; *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T); *Ex parte Hulett* 1968 (4) SA 172 (D); *Ex parte Thompson* 1983 (4) SA 392 (E); Boezaart *Persons* 158–160; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 138–140 fn 137; *Wille's Principles* 376–378.

40 1930 OPD 171 174–175, Heaton *Casebook on the Law of Persons* case **[48]**.

41 *Ex parte AB* 1910 TPD 1332; *Spangenberg v De Waal* [2008] 1 All SA 162 (T).

42 *Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 (2) SA 437 (A).

43 Voet 27.10.10; *Ex parte AB* 1910 TPD 1332.

44 On the functions, powers and duties of a *curator ad litem*, see *Du Plessis v Strauss* 1988 (2) SA 105 (A); *Martin v Road Accident Fund* 2000 (2) SA 1016 (W); *Modiba obo Ruca In re Ruca v RAF* (unreported, GPPHC case no 12610/2013 and case no 73012/13, 27 January 2014); Kruger *LAWSA* vol 17 part 2 *Mental Health* par 297; *Wille's Principles* 379–380.

45 *De Villiers v Espach* 1958 (3) SA 91 (T). The Director of Public Prosecutions is the official *curator ad litem* for state patients: Mental Health Care Act s 1. A state patient is a mentally ill accused in a criminal case

continued

If necessary, a curator is appointed to care for the mentally ill person's person (that is, the person's body), either generally or for a specific purpose.[46] Such a curator is called a *curator personae*. As the appointment of a *curator personae* involves a serious curtailment of a person's rights and freedoms[47] it is not done lightly.[48]

7.6 Mental Health Care Act 17 of 2002

7.6.1 Definition

The fundamental concept in the Mental Health Care Act is that of "mental health care user", which section 1 defines as "a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, state patient and mentally ill prisoner". In certain circumstances the phrase extends to a prospective mental health care user, the person's next-of-kin, someone who has been legally authorised to act on that person's behalf, an administrator appointed in terms of the Act,[49] and the executor of a deceased mental health care user's estate. A person's mental health status is "the level of mental well-being of an individual as affected by physical, social and psychological factors and which may result in a psychiatric diagnosis".[50]

7.6.2 Rights of mental health care users

The objects of the Act are the regulation of mental health care, treatment and rehabilitation services and the manner in which the property of mentally ill persons and persons with severe or profound intellectual disability[51] may be dealt with, and the clarification of the rights and duties of mental health care users and providers.[52]

The Act *inter alia* contains a separate chapter setting out specific rights and duties mental health care users have.[53] These rights and duties operate in addition to the rights other laws

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who is detained by virtue of a court order, pending the decision of a judge in chambers. If a person lacks the necessary mental capacity when instructing an attorney to litigate on his or her behalf, such authorisation is invalid but the legal proceedings which follow it are of full force and effect if the person's *curator ad litem* ratifies the legal steps taken: *Kotze v Santam Insurance Ltd* 1994 (1) SA 237 (C), confirmed on appeal in *Santam Insurance Ltd v Booi* 1995 (3) SA 301 (A); see also *Road Accident Fund v Mdeyide* 2007 (7) BCLR 805 (CC), 2008 (1) SA 535 (CC) par [37] (*obiter*).

46 In certain circumstances a *curator personae* may consent to a sterilisation or termination of pregnancy: see ch 2 above. In *Ex parte Dixie* 1950 (4) SA 748 (W) a *curator personae* was appointed with the sole function of deciding whether or not an operation should be performed on the patient. In *Clarke v Hurst* 1992 (4) SA 630 (D) the patient had suffered serious and irreversible brain damage as a result of which he had been in a coma for years. The applicant, who was his wife, applied to be appointed as *curatrix personae* with the power to authorise discontinuation of medical treatment and artificial feeding of the patient, even though this would cause his death. The court granted the order. It emphasised that a *curator personae* must always act in the best interests of the patient. It concluded that in the circumstances of the present case discontinuation of artificial feeding would be in the best interests of the patient.

47 *Hudson v Price* 1933 CPD 367; *Martinson v Brown; Gray v Armstrong* 1961 (4) SA 107 (C).

48 *Martinson v Brown; Gray v Armstrong* 1961 (4) SA 107 (C); *Ex parte Powrie* 1963 (1) SA 299 (W). In *Hudson v Price* 1933 CPD 367 the view was adopted that a *curator personae* can only be appointed if the person is declared mentally disordered or defective. This view was correctly rejected in *Ex parte Hill* 1970 (3) SA 411 (C).

49 The appointment of an administrator is discussed below in this chapter.

50 S 1.

51 Severe or profound intellectual disability refers to a "range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care": s 1.

52 S 3.

53 Ch III. On human rights, the Bill of Rights, and the treatment and care of mentally ill persons, see Kruger *Bill of Rights Compendium* pars 3EB23–3EB31; Bonthuys 2001 *SALJ* 682–686; Swanepoel 2011 *PELJ* 127, 2011 *Obiter* 282. On a patient's right to receive or refuse treatment, see Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 117 fn 49; Kruger *Bill of Rights Compendium* pars 3EB9–3EB12;

continued

confer on mental health care users.[54] Whenever these rights or duties are exercised or performed regard must be had to the best interests of the mental health care user.[55] The rights of mental health care users include the right to representation (including legal representation),[56] confidentiality,[57] having their person, human dignity and privacy respected,[58] and being provided with care, treatment and rehabilitation services that improve their mental capacity to develop to their full potential and to facilitate their integration into community life.[59] Care, treatment and rehabilitation services may not be used as punishment or for the convenience of other people,[60] must be proportionate to the mental health care user's mental health status, and may intrude only "as little as possible to give effect to the appropriate care, treatment and rehabilitation".[61] Except in urgent cases, mental health care users must be informed of their rights prior to the administration of any care, treatment and rehabilitation services.[62]

The Act also prohibits unfair discrimination on the ground of a person's mental health status,[63] and provides that any determination concerning a person's mental health status must be based solely on factors that are relevant to his or her mental health status and not socio-political or economic status, cultural or religious background, or affinity.[64] A determination of a person's mental health status may be made only for purposes that are directly relevant to his or her mental health status.[65]

Every person, body, organisation or health establishment which provides care, treatment and rehabilitation services must take steps to ensure that mental health care users are protected from exploitation, abuse, degrading treatment, and forced labour.[66] The Act furthermore requires all state organs to determine and co-ordinate the implementation of their policies and measures in a manner that promotes the rights and interests of mental health care users.[67]

Many of the rights set out in the Mental Health Care Act reflect the obligations imposed on South Africa by the Convention on the Rights of Persons with Disabilities. South Africa ratified the Convention in 2007. The definition of "persons with disabilities" in article 1 of the Convention includes persons who have "long-term ... mental [or] intellectual ... impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". In terms of the Convention, South Africa is obliged, *inter alia*, to respect the inherent dignity, physical and mental integrity, and privacy of persons with disabilities.[68] It must also recognise the right to equality of persons with disabilities, prohibit all discrimination on the basis of disability, guarantee

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Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 239–243; Snyman 1983 *JJS* 193; Oosthuizen, Fick and Els 1995 *Medicine and the Law* 601; Allen and Allen 1997 *SALJ* 578 and 724; Kersop and Van den Berg 2016 *Obiter* 679; Lund 2016 *SAJHR* 403; Bilchitz and Mahomed 2016 *SAJHR* 406; Bilchitz 2016 *SAJHR* 410; Dhanda 2016 *SAJHR* 438; Davidson 2016 *SAJHR* 457.

54 S 7(1).
55 S 7(2).
56 S 15.
57 S 13.
58 S 8(1).
59 S 8(2).
60 S 11(1)(*c*).
61 S 8(3).
62 S 17. The information must be given "in an appropriate manner". The urgent cases are listed in s 9(1)(*c*) and are set out under the next heading below.
63 S 10(1).
64 S 12(1). The same applies if someone's mental health status has to be determined for purposes of giving effect to the Criminal Procedure Act.
65 S 12(2).
66 S 11(1)(*a*) and (*b*).
67 S 4(*c*).
68 Arts 3(*a*), 17, 22.

equal and effective legal protection against discrimination, and recognise that persons with disabilities enjoy "legal capacity" on an equal basis with others in all aspects of life.[69] Effective measures must be taken to prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment.[70] Persons with disabilities must also be protected from all forms of exploitation, violence and abuse.[71]

7.6.3 Care, treatment and rehabilitation

The Act distinguishes between different categories of persons requiring mental health care on the ground of whether or not they voluntarily submit to mental health care and admission. The basic premise is that care, treatment and rehabilitation services may only be provided and a mental health care user may only be admitted to a health establishment if one of the following circumstances is present:

(1) The mental health care user consents to it.

(2) A court or Mental Health Review Board[72] authorises it.

(3) Due to the mental health care user's mental illness, any delay in providing the services may result in:

  (a) the mental health care user's death;

  (b) irreversible harm to the mental health care user's health;

  (c) the mental health care user inflicting serious harm on himself or herself or somebody else; or

  (d) the mental health care user causing serious damage to or loss of his or her own or somebody else's property.[73]

If the services are provided or the admission occurs in the circumstances of urgency referred to in paragraph (3) above, the health care provider or health establishment must report this to the Mental Health Review Board. Unless an application is made for voluntary, assisted or involuntary mental health care within 24 hours, the services may not be provided for more than 24 hours.[74]

(a) Voluntary care, treatment and rehabilitation

A person who voluntarily submits to treatment and admission while being capable of making informed decisions in this regard may be treated and admitted without court intervention. Such a person is entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment.[75]

(b) Assisted care, treatment and rehabilitation

A person who is incapable of making informed decisions due to his or her mental health status but who does not refuse health interventions is referred to as an "assisted mental health care user".[76] Assisted care, treatment and rehabilitation services may only be

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69 Arts 3(*b*), 4(1)(*b*) and (*e*), 5, 12(2), 17, 22.

70 Art 15.

71 Art 16.

72 Mental Health Review Boards are established and regulated by ch IV of the Act. For a brief overview of some of the cases reviewed by the Western Cape Mental Health Review Board, see Bateman 2012 *SAMJ* 72.

73 S 9(1).

74 S 9(2).

75 S 25. See also s 9(1)(*a*). Although s 25 does not require that a voluntary patient must have the capacity to submit to treatment and admission, lack of such capacity would mean that the treatment and admission are not truly voluntary: Davidson 2016 *SAJHR* 478.

76 S 1. As Davidson 2016 *SAJHR* 479 points out, the Act does not define the concept "incapable of making informed decisions". Nor does it indicate who must decide or which criteria must be applied in deciding whether a person is incapable of making informed treatment and admission decisions.

administered to a person without his or her consent if the head of a health establishment approves a written application for the provision of such services, and there is a reasonable belief at the time of making the application that the mental health care user is suffering from a mental illness or severe or profound intellectual disability and requires those services for his or her own or other people's health or safety.[77] The application must be made by the mental health care user's spouse, civil union partner, next-of-kin, partner, associate, parent or guardian.[78] If that person is unwilling, incapable or not available to make the application, a health care provider may make the application.[79] In either case the applicant must have seen the mental health care user within seven days prior to making the application.[80]

Upon receipt of the application the head of the health establishment must have the mental health care user examined by two mental health care practitioners.[81] The application may only be approved if the practitioners agree that conditions for assisted care, treatment and rehabilitation are present.[82] An application for admission to a health establishment may only be approved if the practitioners agree that admission is necessary and the head of the establishment is satisfied that the restrictions and intrusions on the mental health care user's rights to freedom of movement, privacy and dignity are proportionate to the care, treatment and rehabilitation services required.[83] If the application is approved, the Mental Health Review Board must be notified. The Review Board must conduct an investigation and then either request the head of the health establishment to continue providing services to the mental health care user or request the person's discharge. The Review Board must report its findings to the head of the provincial department.[84] The mental health care user, or his or her spouse, civil union partner, next-of-kin, partner, associate, parent or guardian may lodge an appeal against the decision of the head of the health establishment with the Review Board.[85]

Six months after commencing care, treatment and rehabilitation services, and once a year thereafter, the head of the health establishment must have the person's mental health status reviewed and submit a report to the Review Board.[86] If the Review Board decides that the person must be discharged, all care, treatment and rehabilitation services administered to him or her must be stopped according to accepted clinical practices and he or she must be discharged unless he or she consents to receiving services.[87]

If the head of a health establishment has reason to believe[88] that the assisted mental health care user has recovered the capacity to make informed decisions, the person must be

77 S 26.

78 S 27(1)(*a*) of the Act read with s 13(2) of the Civil Union Act. An associate is someone who has a substantial or material interest in the well-being of a mental health care user or a person who is in "substantial contact" with the mental health care user: s 1. If the application relates to a minor, it must be made by the minor's parent or guardian: s 27(1)(*a*)(i).

79 S 27(1)(*a*)(ii).

80 S 27(1)(*b*).

81 S 27(4). Neither of the practitioners may be the person who made the application, and at least one of them must be qualified to conduct physical examinations. "[M]ental health care practitioner" refers to a psychiatrist, registered medical practitioner, registered nurse, occupational therapist, psychologist, or social worker who has been trained to provide mental health care, treatment and rehabilitation services: s 1.

82 S 27(7).

83 S 27(8).

84 S 28(1)–(3).

85 S 29(1) of the Act read with s 13(2) of the Civil Union Act.

86 S 30(1)–(3).

87 S 30(5)(*a*).

88 The belief may be based on personal observation, information obtained, or representations made by the mental health care user: s 31(1).

asked whether he or she will voluntarily continue receiving services.[89] If the person is willing to continue, he or she becomes a user of voluntary services. If the person is unwilling, he or she must be discharged if the head of the establishment is satisfied that the person is no longer mentally ill. However, if the head of the establishment is of the view that the person is still mentally ill, the person who applied for assisted services for the mental health care user, and the mental health care practitioner, registered social worker or nurse administering these services must be informed[90] and advised that they have 30 days within which to apply for the person's involuntary commitment.[91] If an application for involuntary commitment is not made within that period, the mental health care user must be discharged.[92]

(c) Involuntary care, treatment and rehabilitation

If the mental health care user is incapable of making informed decisions on the need for care, treatment and rehabilitation services and does not want such services, involuntary services must be provided to him or her if the head of a health establishment approves a written application for the provision of such services.[93] At the time of making the application there must be a reasonable belief that the mental health care user has a mental illness of such a nature that he or she is likely to inflict serious harm on himself or herself or others, or that care, treatment and rehabilitation services are necessary for the protection of his or her financial interests or reputation.[94]

As in the case of assisted services, the application must be made by the mental health care user's spouse, civil union partner, next-of-kin, partner, associate, parent or guardian, or, if they are unwilling, incapable or not available to make the application, by a health care provider.[95] The applicant must have seen the mental health care user within seven days prior to making the application.[96] Upon receipt of the application the head of the health establishment must have the mental health care user examined by two mental health care practitioners.[97] The application may only be granted if the practitioners agree that conditions for involuntary care, treatment and rehabilitation are present.[98] Up to this point the procedure is the same as that which applies in respect of assisted services. However, in the case of involuntary services the mental health care user must be referred for a 72-hour assessment period prior to the further provision of involuntary services. This assessment is done by a medical practitioner and another mental health care practitioner. Their task is to evaluate the mental health care user's physical and mental health status, and to consider whether he or she must continue receiving involuntary services and be involuntarily committed.[99]

After the assessment, the head of the establishment must discharge the mental health care user immediately if he or she is of the opinion that the person's mental health status does not warrant involuntary care, treatment and rehabilitation. However, if the mental health care user consents to receiving services, he or she need not be discharged. If the head of the establishment is of the opinion that the person's mental health status indeed warrants

89 S 31(1).
90 S 31(3).
91 S 31(4). Involuntary commitment is discussed immediately below in this chapter.
92 S 31(5).
93 S 32. See also the definition of "involuntary care, treatment and rehabilitation" in s 1.
94 S 32(*b*). As the reasonable belief need only exist at the time of making the application, the Act seems to permit involuntary treatment after the mental health care user has ceased being likely to inflict serious harm on himself or herself or others or needing care, treatment and rehabilitation services for the protection of his or her financial interests or reputation: Davidson 2016 *SAJHR* 480.
95 S 33(1) of the Act read with s 13(2) of the Civil Union Act. If the application relates to a minor, it must be made by the minor's parent or guardian.
96 S 33(1)(*b*).
97 S 33(4). Neither of the practitioners may be the person who made the application, and at least one of them must be qualified to conduct physical examinations.
98 S 33(7).
99 S 34.

further involuntary services but does not warrant commitment, the person must be discharged subject to the prescribed conditions and procedures for outpatient care, treatment and rehabilitation, and the Review Board must be informed. If the head of the establishment is of the opinion that the person's mental health status warrants involuntary commitment, he or she must submit a written request to the Review Board for approval of further involuntary care, treatment and rehabilitation on an inpatient basis.[100] If the Review Board grants the request, the matter must be referred to the High Court.[101] After considering all the information, the High Court may either order the mental health care user's immediate discharge or his or her further hospitalisation.[102] If necessary, an administrator may be appointed to care for and administer the person's financial affairs.[103] The mental health care user, or his or her spouse, civil union partner, next-of-kin, partner, associate, parent or guardian may lodge an appeal against the decision of the head of the health establishment with the Review Board.[104]

Six months after the commencement of involuntary services, and once a year thereafter, the head of the health establishment must have the person's mental health status reviewed, and submit a report to the Review Board.[105] If the Review Board decides that the person must be discharged, all care, treatment and rehabilitation services must be stopped according to accepted clinical practices and the person must be discharged unless he or she consents to receiving services.[106]

If the head of the establishment has reason to believe[107] that an involuntary mental health care user has recovered the capacity to make informed decisions, he or she must enquire whether the person is willing to voluntarily continue receiving services.[108] If the person is willing to continue, he or she becomes a user of voluntary services. If the person is unwilling, he or she must be discharged if the head of the establishment is satisfied that he or she is no longer mentally ill.[109]

(d) Report by a member of the police

A member of the police who has reason to believe[110] that someone is likely to inflict serious harm on himself or herself or others because of mental illness or severe or profound intellectual disability, must arrest that person. The person must be taken to a state-controlled health establishment for assessment of his or her mental health status and handed over into custody of the head of the establishment or someone the head designates.[111] If, after the assessment, a mental health care practitioner shares the view of the

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100 S 34(3)(*a*)–(*c*). If the head of the establishment subsequently concludes that the mental health care user is fit to be an outpatient, the person must be discharged subject to the prescribed conditions and procedures for outpatient care, treatment and rehabilitation, and the Review Board must be informed: s 34(5).

101 S 34(7)(*c*).

102 S 36(*c*).

103 The appointment of such an administrator is discussed below in this chapter.

104 S 35(1) of the Act read with s 13(2) of the Civil Union Act.

105 S 37(1).

106 S 37(5)(*a*). S 37 applies to persons who are not criminally charged. If a person has been criminally charged and the Review Board finds that he or she does not require involuntary care, treatment and rehabilitation, an application should be made to the High Court for the person's release: *In re JY* 2016 (1) SACR 399 (KZP).

107 The belief may be based on personal observation, information obtained, or representations made by the mental health care user: s 38(1).

108 S 38(1).

109 S 38(2) and (3).

110 The belief may be based on personal observation or information obtained from a mental health care practitioner: s 40(1).

111 S 40(1). Bonthuys 2001 *SALJ* 672–673 questions the legitimacy of police apprehension of mentally ill persons and doubts whether the police have the necessary knowledge to enable them to identify mentally

continued

member of the police, the person must be admitted to the health establishment. Within 24 hours of the person's admission an application must be made to obtain involuntary care, treatment and rehabilitation services for him or her.[112] If, in contrast, the mental health practitioner is of the view that the person is unlikely to cause harm, the person must be released immediately.[113]

The police may also be used to locate, apprehend and return an assisted or involuntary mental health care user who has absconded or is deemed to have absconded from a health establishment, and when an assisted or involuntary mental health care user is transferred to another health establishment.[114]

7.6.4 Place of admission

Mental health care users may only be admitted to health establishments.[115]

7.6.5 Mentally ill prisoners and state patients

The Act also governs the confinement of and provision of mental health care to mentally ill prisoners and state patients.[116] As the relevant provisions apply only to persons who have committed criminal acts, they fall outside the scope of this book.

7.6.6 Care and administration of the property of mentally ill persons

If a High Court conducts an enquiry into a person's mental health and the presiding judge has reason to believe that the person may be incapable of managing his or her property, the judge may initiate an investigation into the person's mental health status and ability to manage his or her property. The court may exercise this power in any other legal proceedings too.[117] If the investigation reveals that the person's mental health status is such that he or she is indeed incapable of managing his or her property, the court makes a recommendation regarding the appointment of an administrator and informs the person and the Master of the High Court accordingly.[118] The Master then appoints an administrator to take care of and administer the person's property, to perform all functions incidental thereto, and to carry on the person's business or undertaking, if any.[119]

The Master may also, upon application by any adult, appoint an administrator in respect of the property of a mentally ill person or a person with severe or profound intellectual disability.[120] Instead of appointing (or declining to appoint) an administrator, the Master may refer the matter for consideration by a judge in chambers.[121] After considering the matter, the judge makes a recommendation to the Master on whether or not an administrator

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ill persons. She suggests that "this function should not be fulfilled by members of the police, who are currently hard-pressed to fulfil their legitimate policing functions": 673.

112 S 40(2)(*a*). See also s 40(3). The application is made in terms of s 33 of the Act.

113 S 40(2)(*b*).

114 S 40(4).

115 Such establishments include health establishments with maximum-security facilities: s 39(1). Health establishments are institutions, facilities, buildings or places (incl community health and rehabilitation centres, clinics, hospitals and psychiatric hospitals) where persons receive care, treatment, rehabilitative assistance, diagnostic or therapeutic interventions or other health services: s 1.

116 Chs VI and VII of the Act.

117 S 61(1).

118 S 61(3).

119 The administrator's powers, functions and duties are similar to those a curator has in terms of ch IV of the Administration of Estates Act: s 63. In addition, some of the provisions of the Administration of Estates Act apply to an administrator appointed in respect of the estate of a "mentally disabled person": Mental Health Care Act s 65. The Mental Health Care Act does not define "mentally disabled person", but it presumably signifies a mental health care user and a person who has a severe or profound intellectual disability.

120 Ss 59(1) and 60(1).

121 S 60(8).

should be appointed. If the judge recommends appointment of an administrator, the Master appoints the administrator.[122]

The power to appoint an administrator does not replace the court's common-law powers to appoint a curator to a mentally ill or intellectually disabled person.

122 S 60(12)–(13). In terms of art 12(4) of the Convention on the Rights of Persons with Disabilities, states parties must ensure that appropriate and effective safeguards are included in all measures relating to the exercise of legal capacity to prevent abuse of disabled persons. These safeguards must ensure, *inter alia*, that the rights, will and preferences of the disabled person are respected and that the measures are proportional and tailored to the particular person's circumstances. The safeguards must also be proportional to the degree to which such measures affect the person's rights and interests. The provisions of the Mental Health Care Act relating to the appointment of an administrator do not comply with the principle of proportionality provided for by the Convention: Holness 2014 *SAJHR* 316, 334–335.

8

INABILITY TO ADMINISTER AFFAIRS OWING TO REASONS OTHER THAN MENTAL ILLNESS

8.1 Introduction

In the previous chapter it was explained that the High Court has the power to appoint a curator or administrator to a mentally ill person. In terms of our common law, the High Court also has the power to appoint a curator to a person who is not mentally ill but is incapable of managing his or her affairs for another reason, such as a physical or intellectual disability.[1] The objective of the appointment of a curator to a person is to protect the person from exploitation.

Because the status of a person who is subject to curatorship is affected, the courts are hesitant to appoint curators.[2] As Judge Blieden pointed out in *Judin v Wedgwood*:[3]

> [T]o appoint a *curator* to a person without full justification therefor . . . constitutes a serious violation of that person's dignity and status, which is contrary to the provisions of s 10 of the Constitution of the Republic of South Africa . . .[4]

Appointing a curator to a disabled person without sufficient justification also violates article 3(*a*) of the Convention on the Rights of Persons with Disabilities, which requires states parties to respect the inherent dignity, individual autonomy and independence of persons with disabilities.[5] South Africa ratified this convention in 2007. Unjustified appointment of a curator further constitutes unfair discrimination on the ground of disability, which violates section 9(3) and (4) of the Constitution and articles 3(*b*), 4(1) and 5 of the Convention on the Rights of Persons with Disabilities.[6]

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1 Voet 27.10.3; Grotius 1.11.1–1.11.3; Van Leeuwen *Censura Forensis* 1.1.16.28.

2 *Mitchell v Mitchell* 1930 AD 217; *Ex parte Kotze* 1955 (1) SA 665 (C); *Ex parte Klopper: In re Klopper* 1961 (3) SA 803 (T), Heaton *Casebook on the Law of Persons* case **[47]**.

3 2003 (5) SA 472 (W) 478J–479A, Heaton *Casebook on the Law of Persons* case **[46]**; see also *Modiba obo Ruca, In re Ruca v RAF* (unreported, GPPHC case no 12610/2013 and case no 73012/13, 27 January 2014).

4 S 10 of the Constitution of the Republic of South Africa, 1996 provides that everyone has inherent dignity and has the right to have his or her dignity respected and protected.

5 In terms of art 1 of the Convention, persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

6 S 9(3) and (4) of the Constitution provides that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on the ground of disability. Art 3(*b*) of the Convention on the Rights of Persons with Disabilities provides that non-discrimination is one of the principles of the Convention. Art 5(2) of the Convention compels states parties to prohibit all discrimination on the basis of disability and to guarantee equal and effective legal protection against discrimination to persons with disabilities. On the Convention, see also ch 7 above.

8.2 Applying to have a curator appointed for a person who is unable to administer his or her affairs

The court gives a liberal interpretation to the categories of persons who can be placed under curatorship. For example, *curatores bonis* have been appointed to persons unable to manage their affairs as a result of a serious illness or the after-effects of a serious illness;[7] physical or intellectual disability;[8] persons who have disappeared and in respect of whom a presumption of death has not been pronounced;[9] and persons residing in an enemy country during war.[10] A *curator bonis* has also been appointed to a prisoner of war.[11]

Advanced age sometimes causes serious illness and physical or intellectual impairment which may result in the need to appoint a curator.[12] Due to aged persons frequently being more vulnerable, the Older Persons Act 13 of 2006 lays down general principles which must guide the implementation of all legislation and all proceedings, actions and decisions by an organ of state regarding an older person or older persons in general.[13] The provisions of the Act extend beyond the appointment of curators. In many respects, the principles embodied in the Act echo those that are laid down by the Children's Act 38 of 2005 regarding minors.[14] Thus, for example, the Older Persons Act stipulates that all proceedings, actions or decisions in a matter concerning an older person must respect, protect, promote and fulfil the person's rights and best interests and the rights and principles set out in the Act; respect the person's inherent dignity; treat him or her fairly and equitably; and protect him or her from unfair discrimination on any ground, including his or her health status or disability.[15] An approach which is conducive to conciliation and problem-solving must be followed in any matter concerning an older person and a confrontational approach must be avoided.[16] Furthermore, a delay in any action or decision must be avoided as far as possible.[17] The Act also deals with abuse of the elderly.[18]

Apart from appointing a *curator bonis*, the court may also appoint a *curator personae* and/or a *curator ad litem* for a person who is unable to manage his or her affairs.[19]

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7 *Ex parte De Villiers* 1943 WLD 56; *Ex parte Stewart-Wynne: In re Mason* 1944 EDL 176; *Ex parte Van Hasselt* 1965 (3) SA 553 (W); *Ex parte Hill* 1970 (3) SA 411 (C); *Ex parte Ewing: In re Sheridan* 1995 (4) SA 101 (O).

8 *In re J Rensburgh* (1835) 3 Menz 99; *In re GC Rens* (1844) 3 Menz 100; *Mitchell v Mitchell* 1930 AD 217; *Hudson v Price* 1933 CPD 367; *Ex parte Van Dyk* 1939 CPD 202; *Van den Berg v Van den Berg* 1939 WLD 228; *Ex parte Maritz* 1944 NPD 339; *Ex parte Bell* 1953 (2) SA 702 (O); *Ex parte Berman: In re Estate Dhlamini* 1954 (2) SA 386 (W); *Ex parte Tomich* 1957 (4) SA 667 (N); *Ex parte Powrie* 1963 (1) SA 299 (W); *Nkosi v Minister of Justice* 1964 (4) SA 365 (W); *Ex parte Tod* 1965 (1) SA 262 (D); *Ex parte Jacobs* 1965 (3) SA 270 (C); *Francescutti v Francescutti; Ex parte Francescutti* 2005 (2) SA 442 (W).

9 *Re McKenzie's Estate* 1908 TS 420; *Ex parte Thomson* 1919 CPD 277; *Ex parte Lennon Ltd* 1929 WLD 195; *Ex parte Luhn* 1935 EDL 40; *Ex parte Shulman* 1955 (1) SA 514 (W); *Ex parte Pearlman* 1957 (4) SA 666 (N). The presumption of death is discussed in ch 2 above.

10 *Ex parte Kuhr* 1940 CPD 327; *Ex parte Becker* 1943 CPD 164.

11 *Ex parte Jones* 1943 WLD 134.

12 See e.g. *Ex parte Geldenhuys* 1941 CPD 243; *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T); *Ex parte Maritz* 1944 NPD 339; *Ex parte De Klerk* 1968 (4) SA 130 (C).

13 S 5(1).

14 See ch 6 above.

15 S 5(2).

16 S 5(3)(*a*).

17 S 5(3)(*b*).

18 Ch 5. For criticism of the Act, see Coertse 2013 *De Rebus* 195. The Older Persons Amendment Bill, 2017 seeks to extend the protection afforded to older persons. It inserts new provisions relating to the monitoring and evaluation of services to older persons into the Older Persons Act and provides for the removal of older persons to temporary safe care without a court order. The Bill also contains stricter and clearer implementation and compliance measures.

19 See e.g. *Martinson v Brown; Gray v Armstrong* 1961 (4) SA 107 (C); *Ex parte Powrie* 1963 (1) SA 299 (W); see also *Ex parte Hill* 1970 (3) SA 411 (C); *Santam Insurance Ltd v Booi* 1995 (3) SA 301 (A). In *Taurog v Lapinsky* 1943 WLD 100 the person was so indifferent to his affairs as to be in danger of suffering serious loss. The court held that, even in the absence of evidence that a person suffers from a mental or physical disability, it

continued

Although the court is not compelled to appoint a curator to someone who consents to the appointment, consent is an important factor in deciding whether or not to place the person under curatorship.[20] For any weight to be attached to his or her consent, the person must be able to understand the nature and effect of the proceedings to place him or her under curatorship.[21] If the person is unable to understand the nature and effect of the proceedings, a *curator ad litem* must first be appointed to represent the person at an inquiry into his or her mental state.

The court does not regard it as proper that a person personally apply to be placed under curatorship, because if the person is in fact incapable of managing his or her affairs, he or she may lack *locus standi in iudicio* to make the application. Therefore, a family member or someone else who has an interest in the person's person or property has to make the application.[22]

The court in whose area the person is domiciled or owns immovable property has jurisdiction to declare him or her incapable of managing his or her affairs and to place him or her under curatorship.[23]

8.3 Legal status of a person who is unable to administer his or her affairs

A person who has been declared incapable of administering his or her affairs and to whom a curator has been appointed has the capacity to conduct his or her affairs whenever he or she is in fact mentally and physically able to do so. In other words, the fact that a *curator bonis* has been appointed in respect of a person's estate does not mean that the person has been deprived of capacity to act and litigate;[24] nor does it mean that the person is incapable of being held accountable for crimes and delicts.[25] In *Pienaar v Pienaar's Curator*[26] Judge President De Villiers stated as follows:

> Here again the curator is merely appointed to assist the person in making legal dispositions in so far as such assistance is necessary, according to the nature of the incapacity in question, but the person still retains his contractual and legal capacities and the administration of his property to the full extent to which he is from time to time mentally or physically able to exercise them.

Accordingly, someone who has been placed under curatorship because of inability to manage his or her affairs can enter into a valid legal transaction with its normal consequences if, at that particular moment, he or she is physically and mentally able to do so.

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can appoint a *curator ad litem* to investigate his or her condition and report on whether he or she is capable of managing his or her affairs. On the different types of curators and their functions, see further ch 7 above.

20 *Mitchell v Mitchell* 1930 AD 217; *Ex parte Van Dyk* 1939 CPD 202; *Ex parte Bell* 1953 (2) SA 702 (O); *Ex parte Berman: In re Estate Dhlamini* 1954 (2) SA 386 (W); *Ex parte Derksen* 1960 (1) SA 380 (N); *Nkosi v Minister of Justice* 1964 (4) SA 365 (W); *Ex parte Van der Linde* 1970 (2) SA 718 (O); *Ex parte Wilson: In re Morison* 1991 (4) SA 774 (T); *Judin v Wedgwood* 2003 (5) SA 472 (W).

21 *Ex parte Van Dyk* 1939 CPD 202; *Ex parte Bell* 1953 (2) SA 702 (O).

22 *Ex parte Geldenhuys* 1941 CPD 243. A creditor does not have a sufficient interest to bring an application for the appointment of a *curator ad litem* in respect of his or her debtor: *Judin v Wedgwood* 2003 (5) SA 472 (W).

23 *Ex parte Derksen* 1960 (1) SA 380 (N); *Ex parte Berry: In re Berry* 1961 (4) SA 79 (D); *Ex parte De Villiers* 1976 (4) SA 576 (O).

24 The completion of prescription of a claim by or against someone who has been placed under curatorship is, however, delayed until a year after the curatorship has come to an end: Prescription Act 68 of 1969 s 13(1).

25 See also Boezaart *Persons* 138; Cronjé *LAWSA* vol 20 part 1 *Persons* par 488 fn 22; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 143; Olivier and Denson in Barratt (ed.) *Persons and the Family* 114.

26 1930 OPD 171 175, Heaton *Casebook on the Law of Persons* case **[48]**; see also Voet 27.10.13; *Ex parte Hamer* 1946 OPD 163.

Thus, for example, it has been held that such a person may marry without his or her curator's consent (whether in or out of community of property),[27] make a will,[28] enter into a contract,[29] and litigate.[30] If it is found that the person lacked the capacity to understand the nature or consequences of a particular transaction when he or she entered into it, he or she is not bound by the transaction and the transaction is void for want of capacity.[31] Consequently, the person's capacity to enter into valid legal transactions may differ from day to day but remains a question of fact.

Since a person who has been placed under curatorship due to a disability does not lose his or her capacity to act or to litigate and can enter into a valid legal transaction whenever he or she is able to do so, the current legal position probably does not violate article 12(2) of the Convention on the Rights of Persons with Disabilities. This article obliges states parties to recognise that persons with disabilities enjoy "legal capacity" on an equal basis with others in all aspects of life. Whether the current position complies with article 12(3) to (4) is less clear. These sub-articles require states parties, *inter alia*, to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" and to ensure that "measures relating to the exercise of legal capacity respect the rights, will and preferences of the person". Currently, a curator's decisions replace those of the person who has been placed under curatorship unless the person is in fact able to make decisions in the particular field; for example, a *curator personae* makes decisions on the person's person whenever the person is unable to do so. It may be that this substituted decision-making does not fully comply with article 12.[32]

27 *Pienaar v Pienaar's Curator* 1930 OPD 171; *Mitchell v Mitchell* 1930 AD 217. But see Sonnekus 2009 *THRHR* 141–143, 145 who states that a person whose estate is administered by a *curator bonis* may enter into a marriage without the consent of the curator but may not enter into an antenuptial contract without such consent.

28 *Spies v Smith* 1957 (1) SA 539 (A).

29 *Ex parte De Bruin* 1946 OPD 110.

30 *De Villiers v Espach* 1958 (3) SA 91 (T).

31 Grotius 1.11.5, 3.30.3; Van Leeuwen *Censura Forensis* 1.4.3.2, *Rooms-Hollands-Regt* 4.2.3; Van der Keessel *Praelectiones* 3.30.3; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA); *Francescutti v Francescutti; Ex parte Francescutti* 2005 (2) SA 442 (W).

32 Holness 2014 *SAJHR* 313 argues that the present system of curatorship must be replaced, as it violates art 12. On art 12, see also ch 7 above.

9

INFLUENCE OF ALCOHOL AND DRUGS

As in the case of mental or physical incapacity, intoxication can affect a person's legal status. The issue of the effect of intoxication on status normally arises in the context of a person's capacity to act or his or her capacity to be held accountable for crimes and delicts. The rules relating to intoxication apply not only to the effects of alcohol but also to those of any drug.[1]

The influence of alcohol or drugs affects capacity to act only for as long as it lasts. Thus it usually results in only a temporary loss of capacity to act.[2] If, however, a person becomes incapable of managing his or her affairs because of continuous abuse of alcohol or drugs, he or she may be placed under curatorship.[3]

As to the degree of the influence of alcohol or drugs that is required for the law to consider a person's capacity to act to be affected, Judge Rumpff held in *Van Metzinger v Badenhorst*[4] that it is insufficient if the person was merely more easily persuadable or more willing to enter into a transaction. What is required is that the person must have been unaware that he or she was entering into a transaction or must have had no idea of its provisions. Accordingly, the mere fact that a person is under the influence of alcohol or drugs or is rendered reckless by his or her consumption of alcohol or drugs does not mean that the transaction is not legally binding. The influence of alcohol or drugs must be such as to deprive the person of his or her powers of reasoning.[5] A transaction which is concluded under these circumstances is void *ab initio* and cannot be ratified.[6] The *onus* of proof is on the party who alleges that the person was under the influence of alcohol or drugs.[7]

A person who is under the influence of alcohol or drugs can be held liable on the ground of unjustified enrichment or *negotiorum gestio* because such liability is not based on the existence of a valid agreement.[8]

As the influence of alcohol or drugs often diminishes a person's ability to appreciate the consequences of his or her actions, it can affect his or her capacity to be held accountable for delicts and crimes.[9]

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1 Olivier and Denson in Barratt (ed.) *Persons and the Family* 102; Cronjé *LAWSA* vol 20 part 1 *Persons* par 489; De Wet and Van Wyk 57; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 143 fn 152; Van der Vyver and Joubert 413.

2 Voet 18.1.4; Grotius 3.14.5; Van Leeuwen *Censura Forensis* 1.4.19.3; Van der Linden 1.14.3; *Dennis v Kupfel* (1896) 11 EDC 63; *Donovan v Rowbotham* (1905) 19 EDC 38; *Goodman v Pritchard* (1907) 28 NLR 227; *Van Metzinger v Badenhorst* 1953 (3) SA 291 (T).

3 *Ex parte Derksen* 1960 (1) SA 380 (N). On the appointment of a curator to a person who is incapable of managing his or her affairs, see ch 8 above.

4 1953 (3) SA 291 (T), Heaton *Casebook on the Law of Persons* case **[49]**.

5 *Goodman v Pritchard* (1907) 28 NLR 227; *Van Metzinger v Badenhorst* 1953 (3) SA 291 (T).

6 *Ibid.*

7 *Ibid.*

8 Cronjé *LAWSA* vol 20 part 1 *Persons* par 489; De Vos 96, 220; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 145. See also Van der Vyver and Joubert 413–414.

9 Further on the delictual and criminal liability of an intoxicated person, see Boezaart *Persons* 150–151; Neethling and Potgieter *Delict* 132; Loubser and Midgley (eds) *Delict* 107–108; Olivier and Denson in Barratt (ed.) *Persons and the Family* 103–104.

10

PRODIGALITY

10.1 Introduction

Prodigals are persons with normal mental ability who squander their assets in an irresponsible and reckless way due to some defect in their power of judgement.[1] To protect such people and their families from their prodigal tendencies their status can be restricted by an order of court.[2] The reason for a person's prodigality is of no real importance, but from the case law it appears that prodigality normally goes together with alcoholism, drug addiction and/or gambling.[3]

Unlike mental illness,[4] prodigality as such does not affect a person's status. It is only once the person has been declared a prodigal and has been prohibited (interdicted) from managing his or her affairs that his or her capacities are restricted.

Any interested party (including the prodigal personally)[5] may apply to court for an order declaring the person to be a prodigal, interdicting the person from administering his or her estate, and requesting the appointment of a *curator bonis* to administer the person's estate.[6]

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1 For common-law definitions of prodigality, see Voet 27.10.6; Grotius 1.11.4; Van Leeuwen *Rooms-Hollands-Regt* 1.16.13; Van der Keessel *Praelectiones* 1.11.4.

2 See e.g. *Master of the Supreme Court v Farrer* 1906 TS 748; *Lockwood v Lockwood* 1935 EDL 1; *Ex parte McLinden* 1945 OPD 96; *Yared v Yared* 1952 (4) SA 182 (T); *Traub v Traub* 1955 (2) SA 671 (C); *Delius v Delius* 1960 (1) SA 270 (N).

3 See e.g. *Re Chism* (1892) 9 SC 61; *Master of the Supreme Court v Farrer* 1906 TS 748; *Lockwood v Lockwood* 1935 EDL 1; *Cillie v Cillie* 1938 CPD 513; *Yared v Yared* 1952 (4) SA 182 (T); *Ex parte Wilding* 1953 (1) SA 633 (C); *Delius v Delius* 1960 (1) SA 270 (N).

4 See ch 7 above.

5 For examples, see *Re Chism* (1892) 9 SC 61 (brother); *In re Miller: Ex parte Keldie* (1892) 9 SC 414 (daughter); *Master of the Supreme Court v Farrer* 1906 TS 748 (Master); *Ex parte Yarr* 1927 CPD 366 (prodigal); *Cillie v Cillie* 1938 CPD 513 (former spouse); *Ex parte McLinden* 1945 OPD 96 (prodigal and spouse jointly); *Ex parte Wilding* 1953 (1) SA 633 (C) (spouse); *Delius v Delius* 1960 (1) SA 270 (N) (spouse).

6 In the past it was the practice of our courts to confer upon a prodigal's *curator bonis* the same powers as those granted to a mentally ill person's *curator bonis* in terms of s 65 of the Mental Disorders Act 38 of 1916. Although this section was not directly applicable to prodigals, the courts found in it a useful summary of the powers that should be conferred upon the curator and, instead of setting out those powers in each case, the courts simply referred to s 65: *Cillie v Cillie* 1938 CPD 513; *Ex parte Tolmie & Japhet: In re Estate Linklater* 1939 WLD 36; *Ex parte McLinden* 1945 OPD 96; *Delius v Delius* 1960 (1) SA 270 (N). S 65 was repealed by the Administration of Estates Act 66 of 1965, which currently regulates the powers and duties of curators: see ch IV. In *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T) Boshoff J was of the opinion that it is no longer necessary to confer upon the *curator bonis* all the powers mentioned in the now-repealed s 65, while Fannin J stated in *Ex parte Hulett* 1968 (4) SA 172 (D) that the court order ought to specify the powers conferred on the curator. In *Ex parte Thompson* 1983 (4) SA 392 (E) Smalberger J held that, since *Hulett*'s case, it had become practice to confer upon a curator the powers set out in that case, but that this did not mean that such powers were exhaustive. In *Ex parte Thompson* the court gave the curators the further power of making such gifts and loans to his children and grandchildren on behalf of the person placed under curatorship as the Master may consider reasonable in the circumstances. The latter case did not deal with a prodigal but with the general powers of a *curator bonis*.
It is submitted that prodigality does not fall within the scope of "severe or profound intellectual disability"

continued

The case law reflects that it usually is a family member, particularly the prodigal's spouse, who applies for the order.[7] The application is made by way of notice of motion and supporting affidavits. The respondent must be notified of the application so that he or she may oppose it on the return day.[8] The applicant may ask that the rule *nisi* serve as an interim interdict restraining the respondent, pending a final order, from administering his or her estate. Because such an interdict has serious and far-reaching consequences for the prodigal, it will be granted only "in exceptional circumstances, where there is some pressing and immediate urgency".[9]

A prodigal is not mentally incapacitated and will normally be fully able to understand the nature and implications of the application to appoint a *curator bonis* to administer his or her estate. Accordingly, a *curator ad litem* will be appointed to assist a prodigal in exceptional cases only.[10]

As the rights of third parties are also affected by a declaration of prodigality, the court order must be published.[11] In *Delius v Delius*[12] it was required that the order be published in the *Government Gazette* and a local newspaper.

A prodigal's status is not automatically fully reinstated when he or she abandons his or her prodigal tendencies; nor does a marriage or civil union discharge a prodigal from curatorship.[13] A prodigal regains full capacity only when he or she is discharged from curatorship by a court order.[14]

10.2 Legal capacity

The limitations on an interdicted prodigal's legal capacity relate to his or her participation in commercial dealings and handling finances.[15] For example, an interdicted prodigal is barred from being a director of a company[16] or a trustee of an insolvent estate.[17]

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and that an administrator can accordingly not be appointed to a prodigal in terms of ch VIII of the Mental Health Care Act 17 of 2002. On the Mental Health Care Act, see ch 7 above.

7 E.g. *Lockwood v Lockwood* 1935 EDL 1; *Yared v Yared* 1952 (4) SA 182 (T); *Ex parte Wilding* 1953 (1) SA 633 (C). If a marriage or civil union is in community of property and one spouse or civil union partner squanders the joint estate, the other spouse or civil union partner may apply to the court for immediate division of the joint estate: Matrimonial Property Act 88 of 1984 s 20; Civil Union Act 17 of 2006 s 13(2). Alternatively he or she may invoke s 16(2) of the Matrimonial Property Act (read with s 13(2) of the Civil Union Act in the case of a civil union), which empowers the court to suspend the power of a spouse or civil union partner to deal with the joint estate for a definite or an indefinite period if this is essential for the protection of the interest of the other spouse or civil union partner in the joint estate. In a marriage or civil union that is subject to the accrual system, the court may be asked to order the immediate division of the accrual in terms of s 8 of the Matrimonial Property Act (read with s 13(2) of the Civil Union Act in the case of a civil union) if the conduct of one of the spouses or civil union partners seriously prejudices or will probably seriously prejudice the other's right to share in the accrual at the dissolution of the marriage or civil union.

8 *Lockwood v Lockwood* 1935 EDL 1; *Master of the Supreme Court v Farrer* 1906 TS 748; *Yared v Yared* 1952 (4) SA 182 (T).

9 *Delius v Delius* 1960 (1) SA 270 (N) 272A–B. See also *Ex parte Wilding* 1953 (1) SA 633 (C).

10 *Ex parte McLinden* 1945 OPD 96; *Delius v Delius* 1960 (1) SA 270 (N).

11 Grotius 1.11.4; Van Leeuwen *Rooms-Hollands-Regt* 1.12.3, 1.16.13, 2.7.8, *Censura Forensis* 1.1.16.28; Van der Keessel *Praelectiones* 1.11.4; Groenewegen 45.1.6; Voet 27.10.8; Van der Linden 1.5.8; *Delius v Delius* 1960 (1) SA 270 (N).

12 1960 (1) SA 270 (N).

13 *Vedeski v Vedeski* 1923 WLD 31.

14 Van der Keessel *Praelectiones* 1.11.4; Grotius 1.11.4; Voet 27.10.7.

15 Boezaart *Persons* 140; Kruger and Skelton (eds) *Persons* 146–147; Olivier and Denson in Barratt (ed.) *Persons and the Family* 108.

16 Companies Act 71 of 2008 s 69(7)(*b*).

17 Insolvency Act 24 of 1936 s 55(*c*).

10.3 Capacity to act

Merely declaring someone to be a prodigal is not enough to limit the person's capacity to act: the declaration must be coupled with an order restraining the person from administering his or her estate.[18] The effect of an order that interdicts a prodigal from administering his or her estate is that the prodigal's legal position becomes analogous to that of a minor, rather than that of a mentally ill person.[19] Like a minor, an interdicted prodigal has limited capacity to act and may not independently enter into juristic acts by which he or she incurs obligations.[20] An interdicted prodigal can either enter into transactions assisted by his or her curator or the curator can act on his or her behalf.[21]

It must be remembered that a mentally ill person's incapacity to act is a result of his or her mental illness and not of the court order declaring him or her to be mentally ill, whereas an interdicted prodigal's capacity to act is restricted by the court order and not by a mental defect.[22] In *Phil Morkel Bpk v Niemand*[23] it was said that a prodigal's capacity to act is curtailed because he or she lacks the necessary judgement to know which obligations he or she should be party to, and not because he or she cannot take part normally in the creation of an obligation. In the case of interdicted prodigals and of mentally ill persons, the purpose of the restriction on their capacity to act is protective, even though the reason for the protection differs. In the case of an interdicted prodigal – as in the case of a minor – the reason is the person's lack of judgement (*onoordeelkundigheid*).

An interdicted prodigal's curator must honour transactions the prodigal validly concluded before being interdicted,[24] because up till then the prodigal had full capacity to act.

If an interdicted prodigal enters into a legal transaction with a third party in disregard of the court order interdicting him or her from dealing with his or her estate, he or she may be prosecuted for contempt of court.[25] In respect of the validity of the particular transaction the position is the same as in the case of a minor: the prodigal's curator may ratify or repudiate it.[26] If the transaction is ratified, it is binding. If repudiated, the other party must return whatever the interdicted prodigal has delivered or paid,[27] but may hold the interdicted prodigal liable on the basis of unjustified enrichment.[28]

If an interdicted prodigal misrepresents himself or herself as a person having full capacity to act or as having his or her curator's consent, the question arises whether he or she can be

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18 Grotius 1.11.4; Van der Keessel *Praelectiones* 1.11.4; Groenewegen 45.1.6; *Re Chism* (1892) 9 SC 61; *Cillie v Cillie* 1938 CPD 513; *Ex parte McLinden* 1945 OPD 96; *Ex parte Wilding* 1953 (1) SA 633 (C); *Delius v Delius* 1960 (1) SA 270 (N).

19 Voet 27.10.9; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C). On the position of a minor, see ch 6 above.

20 Voet 27.10.9; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

21 Voet 27.10.9; Boezaart *Persons* 140; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Wet and Van Wyk 58; Hahlo and Kahn *South Africa* 387; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 153; Kruger and Skelton (eds) *Persons* 147; Olivier and Denson in Barratt (ed.) *Persons and the Family* 106; *Wille's Principles* 385.

22 Grotius 1.11.4; Voet 27.10.7; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

23 1970 (3) SA 455 (C), Heaton *Casebook on the Law of Persons* case **[50]**.

24 Voet 27.10.7; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

25 *S v Beyers* 1968 (3) SA 70 (A).

26 *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C); Boezaart *Persons* 141; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 153, 154; Kruger and Skelton (eds) *Persons* 148; Van der Vyver and Joubert 360; *Wille's Principles* 385.

27 Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds) *Persons* 148; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Van der Vyver and Joubert 361.

28 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Vos 96, 220; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds) *Persons* 148; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Van der Vyver and Joubert 361. But see Du Plessis 85 who states that the restitutionary consequences of a contract a prodigal concluded without the consent of his or her curator are unclear if the contract is repudiated by the curator.

held contractually liable on the ground of that misrepresentation. Holding an interdicted prodigal liable on the contract would defeat the object of the interdict prohibiting him or her from dealing with his or her estate (just like holding a fraudulent minor contractually liable would defeat the object of limiting the minor's capacity to act[29]) and is therefore not supported.[30]

Although there was some controversy among Roman-Dutch writers on whether an interdicted prodigal may enter into a valid marriage without his or her curator's consent,[31] modern South African writers are in agreement that the curator's consent is not necessary.[32] The same should apply in respect of a civil union.

A prodigal's curator cannot make a will on behalf of the prodigal. Nor can the curator assist the prodigal in making one.[33] Whether the prodigal has the capacity personally to make a will is unclear. The common-law position seems to be that a prodigal can execute a valid will provided that it benefits his or her descendants or otherwise deals with his or her property equitably.[34] However, as the interdict deprives the prodigal of the power to make any disposition of his or her property whatsoever, it was considered safer to obtain permission from the state to make a will.[35] To what state body application had to be made was not indicated. It seems that currently there is none in South Africa that can give the necessary consent. In *Ex parte F*[36] it was held that the Supreme Court (now the High Court) does not have the power to consent to a prodigal's making a will. The enactment of the Wills Act 7 of 1953 did not solve the problem, for the Act does not clearly indicate whether a prodigal has the capacity to make a will. Section 4 permits "[e]very person" above the age of 16 years to make a will unless, at the time of making the will, that person is "mentally incapable of appreciating the nature and effect of his act". As a prodigal is usually not "mentally incapable of appreciating the nature and effect of his act" it seems that section 4 empowers him or her to make a will in which he or she can, presumably, like any other person who has the capacity to make a will, dispose of his or her property as he or she likes.[37] In contrast, it may be argued that section 4 has to be interpreted in light of the common-law provisions requiring the prodigal's will to benefit his or her descendants or otherwise deal equitably with his or her property.[38] The solution lies in enacting legislation which deprives an interdicted prodigal of the capacity to make a will without the consent of the court (or the Master of

29 On the liability of a minor who has committed a misrepresentation, see ch 6 above.

30 See also Boezaart *Persons* 141–142; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds) *Persons* 148; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Van der Vyver and Joubert 362.

31 Voet 23.1.3 and Kersteman 90 (*sv* "curatele") submit that such consent is required, while Brouwer 1.4.18 (see also Van Bijnkershoek 2.1536; Van Leeuwen *Rooms-Hollands-Regt* 4.2.3 fn (e)) advocates the opposite view.

32 Boezaart *Persons* 142; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 155; Kruger and Skelton (eds) *Persons* 149; Joubert in Clark (ed.) *Family Law Service* par A31; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Van der Vyver and Joubert 362; *Wille's Principles* 385–386; Sonnekus 2009 *THRHR* 139–140. See further *Pienaar v Pienaar's Curator* 1930 OPD 171, Heaton *Casebook on the Law of Persons* case **[48]**; *Mitchell v Mitchell* 1930 AD 217; *Ex parte Hamer* 1946 OPD 163. A prodigal's capacity to marry is discussed in more detail in Heaton and Kruger *Family Law* ch 3.

33 Boezaart *Persons* 142; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 158 fn 209; Kruger and Skelton (eds) *Persons* 149; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Spiro *Parent and Child* 112; Van der Vyver and Joubert 364.

34 See the authority referred to in *Ex parte F* 1914 WLD 27; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 458GH.

35 See the discussion in *Ex parte F* 1914 WLD 27.

36 1914 WLD 27.

37 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Waal et al *LAWSA* vol 31 *Wills and Succession* par 273 fn 2; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 158; Lee and Honoré par 563 fn 2; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; Van der Merwe and Rowland 211.

38 Beinart 1953 *SALJ* 283 294 doubts whether the Wills Act affords a prodigal the capacity to make a will.

the High Court), and at the same time authorises the court (or the Master) to give such consent,[39] or legislation which provides that a prodigal's estate has to devolve according to the rules of intestate succession.[40] However, such legislation would be premised on the notion that placing limitations on a prodigal is constitutionally justifiable, which, it is submitted, is doubtful.[41]

If the arguments in *Phil Morkel Bpk v Niemand*[42] are applied consistently, a will the prodigal executed before being interdicted as a prodigal remains valid because the prodigal had the required capacity to act when the will was executed.

An interdicted prodigal retains parental responsibilities and rights in respect of his or her child.[43] This means, *inter alia*, that a prodigal can consent to his or her child's marriage without obtaining his or her curator's consent[44] and, incongruously, apparently retains control of the child's estate.[45]

10.4 Capacity to litigate

In principle, an interdicted prodigal may not embark on litigation without his or her curator's consent because, through such litigation, he or she might incur liability for costs which would lead to a disposition of his or her estate and would therefore be in breach of the interdict prohibiting him or her from administering his or her estate.[46] An interdicted prodigal may, however, sue unassisted for divorce, and for an order to have his or her curator dismissed or the curatorship set aside.[47]

10.5 Capacity to be held accountable for crimes and delicts

Prodigality and an order interdicting a prodigal from administering his or her estate do not affect the prodigal's capacity to be held accountable for crimes and delicts he or she commits.[48]

10.6 Constitutional implications of interdiction as a prodigal

It is submitted that the limitations placed on interdicted prodigals are unconstitutional. The interdict preventing the prodigal from administering his or her estate infringes his or

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39 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 158.

40 Boezaart *Persons* 142; Van der Vyver and Joubert 364.

41 The constitutionality of the limitations is discussed below in this chapter.

42 1970 (3) SA 455 (C).

43 *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C); Boezaart *Persons* 142; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 157; Kruger and Skelton (eds) *Persons* 150; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107; *Wille's Principles* 385.

44 Boezaart *Persons* 142; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Hahlo *Husband and Wife* 92; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 157 fn 203; Kruger and Skelton (eds) *Persons* 150; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107.

45 Boezaart *Persons* 142; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 157 fn 203; Kruger and Skelton (eds) *Persons* 150; Olivier and Denson in Barratt (ed.) *Persons and the Family* 107.

46 Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 157 fn 204; Kruger and Skelton (eds) *Persons* 150. This explanation was originally put forward by Boberg (179 fn 90). But see Boezaart *Persons* 143; Van der Vyver and Joubert 364 and *Wille's Principles* 385 who suggest that an interdicted prodigal may litigate unassisted.

47 *Ribbens v Ribbens* 1965 1 PH F5 (T).

48 Voet 27.10.9; Boezaart *Persons* 143; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 156–157; Kruger and Skelton (eds) *Persons* 150; Olivier and Denson in Barratt (ed.) *Persons and the Family* 108; Van der Vyver and Joubert 364–365; *Wille's Principles* 385 fn 149.

her rights to dignity[49] and privacy.[50] It might be argued that the infringement is reasonable and justifiable in the case of a prodigal with dependants to support, as society is justified in requiring a person who has dependants "to conform to socially acceptable spending patterns lest his dependants become a charge upon society through his profligacy".[51] However, distinguishing between prodigals with dependants and those without dependants falls foul of the right to equality before the law and equal protection and benefit of the law.[52] It is submitted that the duty of support is an insufficient justification for the infringement of the prodigal's constitutional rights and that the limitations placed on all prodigals are unconstitutional.[53]

49 S 10 of the Constitution of the Republic of South Africa, 1996.

50 S 14 of the Constitution.

51 This view was advanced by Boberg in 1977 already as a general justification for the imposition of limitations on the status of an interdicted prodigal: Boberg 180.

52 S 9(1) of the Constitution.

53 See further Cockrell *Bill of Rights Compendium* par 3E35; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 157 fn 203. See also Boezaart *Persons* 139 fn 111.

11

INSOLVENCY

11.1 Introduction

A person is insolvent if his or her liabilities exceed his or her assets (in other words, when he or she has more debts than assets). If the person's estate is sequestrated by the High Court as a result of this state of affairs, the sequestration affects the person's legal capacity, capacity to act and capacity to litigate. The limitations that are imposed on the insolvent do not have the object of punishing him or her but of protecting others.[1]

When a person is declared insolvent and his or her estate is sequestrated, he or she is divested of the estate, which then vests in the Master of the High Court until such time as a trustee is appointed. When the trustee is appointed the insolvent estate vests in the trustee.[2] In the case of spouses or civil union partners whose marriage or civil union is subject to community of property, the joint estate is sequestrated and both of the spouses or civil union partners are rendered insolvent by the sequestration order.[3] Even if the order refers only to sequestrating the joint estate, all assets of both of the spouses or civil union partners fall into the insolvent estate. This applies even to property which is excluded from the joint estate.[4]

In general all property the insolvent acquires during insolvency also vests in the insolvent estate.[5] Some assets do, however, fall outside the insolvent estate. They include:

(1) Earnings the Master of the High Court has allowed the insolvent to keep for his or her own and his or her dependants' support.[6]

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1 Because protection of the public is the rationale for the disabilities and disqualifications imposed on the insolvent, the limitations on the insolvent's rights do not violate the Bill of Rights: Boezaart *Persons* 145 fn 160; Cockrell *Bill of Rights Compendium* par 3E36; Heaton in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 219 fn 60. See also *Podlas v Cohen and Bryden* 1994 (3) BCLR 137 (T), 1994 (4) SA 662 (T).

2 Insolvency Act 24 of 1936 s 20(1)(*a*). Some years ago, moves were afoot to replace the Insolvency Act. After an investigation lasting more than a decade, the South African Law Commission published a *Report on the Review of the Law of Insolvency Project 63* in 2000. Vol 2 of the report contains a draft Insolvency Bill which embodies the Commission's recommendations on the reform of our insolvency law. The Bill has not yet been tabled in Parliament.

3 See e.g. *De Wet v Jurgens* 1970 (3) SA 38 (A); *Badenhorst v Bekker* 1994 (2) SA 155 (N); *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA), 2003 (1) SA 671 (SCA); *Voget v Kleynhans* 2003 (2) SA 148 (C). In the case of a marriage out of community of property, the solvent spouse's property vests in the trustee as if the property were part of the insolvent estate, and the trustee has the power to deal with the property as if it were part of the insolvent estate: Insolvency Act s 21(1). However, the solvent spouse is not prohibited from dealing with his or her property. If he or she alienates his or her property, the alienation is valid unless, and until, the trustee of the insolvent estate successfully attacks it: *Motala v Moller* 2014 (6) SA 223 (GJ). S 21(13) of the Insolvency Act includes a heterosexual life partner in the definition of a spouse. However, if an insolvent life partner is still legally married, it is his or her spouse's estate – and not that of his or her life partner – which vests in the Master and trustee: *Chaplin v Gregory* 1950 (3) SA 555 (C).

4 *Badenhorst v Bekker* 1994 (2) SA 155 (N); *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA), 2003 (1) SA 671 (SCA).

5 Insolvency Act s 20(2)(*b*).

6 Insolvency Act s 23(5).

(2) Pension money.[7]

(3) Compensation the insolvent receives for loss or damage as a result of defamation or personal injury.[8]

(4) Certain personal belongings such as clothes, bedding, household furniture, tools and other essential means of subsistence.[9]

(5) Certain life insurance policies.[10]

11.2 Legal capacity

An insolvent person's legal capacity is influenced by the sequestration of his or her estate as there are certain offices he or she cannot hold. For example, an insolvent person may not be a director of a company or mutual bank,[11] or a trustee.[12]

11.3 Capacity to act

Even though the trustee of an insolvent estate administers the estate this does not mean that the insolvent loses all capacity to act. The insolvent may still enter into contracts, provided that he or she does not thereby purport to dispose of property of the insolvent estate.[13] However, the insolvent needs the written consent of the trustee to enter into a contract which adversely affects or is likely to adversely affect the insolvent estate.[14] The insolvent also needs the trustee's consent to carry on, be employed in or have any interest in the business of a trader who is a general dealer or manufacturer.[15]

If the insolvent enters into a contract in breach of these provisions, the contract is nevertheless valid if the following requirements are met:

(1) The property the insolvent disposed of was acquired after sequestration.

(2) The disposition was for valuable consideration.

(3) The person with whom the insolvent transacted was unaware and had no reason to suspect that the estate was under sequestration.[16]

Other contracts in breach of the limitations are voidable at the instance of the trustee.[17]

11.4 Capacity to litigate

The insolvent does not lose all capacity to litigate when his or her estate is sequestrated.[18] Upon sequestration, all civil proceedings by or against the insolvent are stayed until a trustee is appointed to act on behalf of the insolvent estate.[19] For the rest, the insolvent

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7 Insolvency Act s 23(7).

8 Insolvency Act s 23(8).

9 Insolvency Act s 82(6). The insolvent's household furniture, tools and other essential means of subsistence are excluded only to the extent that his or her creditors or the Master of the High Court allow him or her to keep them for personal use.

10 Long-Term Insurance Act 52 of 1998 s 63(1).

11 Companies Act 71 of 2008 s 69(8)(*b*)(i) and Mutual Banks Act 124 of 1993 s 38(*b*)(i), respectively.

12 Insolvency Act ss 55(*a*) and 58(*a*).

13 Insolvency Act s 23(2).

14 *Ibid.*

15 Insolvency Act s 23(3). If the trustee refuses consent, the insolvent may appeal to the Master of the High Court.

16 Insolvency Act s 24(1).

17 *WL Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

18 See e.g. *Greyler v Landsdown* 1991 (3) SA 175 (T); *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (E); *Voget v Kleynhans* 2003 (2) SA 148 (C).

19 Insolvency Act s 20(1)(*b*).

retains *locus standi in iudicio*. The insolvent may, in particular, in his or her own name and without the trustee's consent or cooperation, sue or be sued in respect of:

(1) Any matter relating to his or her status or any right in so far as it does not affect the insolvent estate.[20]

(2) Any claims arising from contracts concluded after sequestration that are not detrimental to the insolvent estate.[21]

(3) Any claims to recover a pension to which he or she is entitled.[22]

(4) Actions for compensation in respect of defamation or personal injury he or she suffered. The insolvent must, however, have the court's consent to institute an action against the trustee of the insolvent estate on the ground of malicious prosecution or defamation.[23]

(5) Remuneration for work done or professional services rendered by the insolvent or on his or her behalf after sequestration.[24]

(6) Actions against him or her for any delict he or she committed after sequestration.[25]

(7) Actions to recover property or institute a claim in favour of the insolvent estate should the trustee refuse, neglect or decline to do so.[26]

(8) Actions against the trustee of the insolvent estate for maladministration or improper disposal of assets of the insolvent estate or the improper recognition of obligations to the detriment of the insolvent estate.[27]

If the insolvent embarks upon unnecessary litigation, the court may order the insolvent to provide security for his or her opponent's costs before proceeding. However, the mere fact that someone is insolvent does not warrant an order for security for costs against him or her.[28]

11.5 Capacity to be held accountable for crimes and delicts

Insolvency does not affect the insolvent's capacity to be held accountable for crimes and delicts. However, if the insolvent commits a delict after sequestration, the compensation must be paid out of those assets the insolvent acquired after sequestration that fall outside the insolvent estate.[29]

11.6 Rehabilitation

The legal limitations sequestration places on the capacity of an insolvent person come to an end when he or she is rehabilitated by an order of the High Court[30] or once ten years

20 Insolvency Act s 23(6).
21 Insolvency Act s 23(6) read with s 23(2).
22 Insolvency Act s 23(7).
23 Insolvency Act s 23(8).
24 Insolvency Act s 23(9). This is subject to s 23(5), which entitles the trustee to claim so much of the insolvent's earnings as the Master of the High Court determines is not required for the support of the insolvent and his or her dependants.
25 Insolvency Act s 23(10).
26 The insolvent has *locus standi in iudicio* in respect of these matters because he or she retains a reversionary interest in his or her insolvent estate: see e.g. *Mears v Rissik, Mackenzie and Mears' Trustee* 1905 TS 303; *Nieuwoudt v The Master* 1988 (4) SA 513 (A); *Voget v Kleynhans* 2003 (2) SA 148 (C).
27 *Ecker v Dean* 1938 AD 102; *Grevler v Landsdown* 1991 (3) SA 175 (T).
28 See e.g. *Ecker v Dean* 1938 AD 102; *Hobson v Abib* 1981 (1) SA 556 (N).
29 Insolvency Act s 23(10).
30 Insolvency Act s 129(1). Rehabilitation may be subject to conditions: s 127(2). The court has a discretion either to grant or to refuse the application for rehabilitation: *Ex parte Fourie* [2008] 4 All SA 350 (D).

have elapsed since the sequestration.[31] Rehabilitation also discharges all debts the insolvent incurred prior to sequestration.[32] It is the insolvent – not his or her estate – who is rehabilitated.[33] Consequently, the estate of a person who died while insolvent cannot be rehabilitated.[34]

31 Insolvency Act s 127A(1).

32 Insolvency Act s 129(1)(*b*).

33 *Acar v Pierce* 1986 (2) SA 827 (W); *Vengadesan NO v Shaik* 2014 (3) SA 14 (KZD).

34 *Vengadesan NO v Shaik* 2014 (3) SA 14 (KZD); Sharrock *LAWSA* vol 11 *Insolvency* par 353 fn 1. But see *Ex parte Estate Cane* 1931 (1) PH C6; *Ex parte Estate Swaites' Executors* 1938 CPD 9; *Ex parte Feinberg's Executors* 1907 TS 960; *Ex parte Moolman NO* 1943 TPD 258; *Ex parte Van Driel's Estate* 1934 TPD 137; *Moodley NO v Milne NO* 1965 (1) SA 154 (D).

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